Supreme Court, U.S.
FILED

97-219 AUG 4 1997

OFFICE OF THE CLERK

No. -

In the Supreme Court of the United States

OCTOBER TERM, 1996

PENOBSCOT INDIAN NATION,
PETITIONER,

v.

KEY BANK OF MAINE, *et al.*,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

STANLEY W. WHEATLEY
Counsel of Record
PETER J. HALEY
STEPHEN F. GORDON
GORDON & WISE
101 Federal Street
Boston, MA 02110
(617) 261-0100
Counsel for Petitioner

Blanchard Press, Inc., Boston, Mass — Law Printers (617) 426-6690

QUESTION PRESENTED

1. Whether 25 U.S.C. §81, a statute enacted for the benefit of Indian tribes in 1872, should be judicially construed to reflect modern trends and practices and, thus, to limit the words "Indian lands" to mean only so-called "Indian trust lands" and not lands held by Indians in fee simple for investment purposes?

LIST OF PARTIES

The Petitioner, Penobscot Indian Nation, is a federally recognized Indian tribe and the plaintiff below.

Respondent, Key Bank of Maine, a corporation, is a defendant and plaintiff in counterclaim below.

Respondent, John Palmer, is an individual and a defendant and counterclaim plaintiff below. The Respondents, Palmer Management Corporation and Palmer Development Corporation, both corporations, are defendants and plaintiffs in counterclaim below.

Respondents, Consumer Water Company, Burlington Homes of New England, Inc. and SHC Corporation, are corporations and defendants below.

Respondent, John Schiavi is an individual who is a defendant and counterclaim plaintiff below.

Michael Marcello, Gerald Pardilla and Reuben Phillips are individuals who are third party defendants and appellees below.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
I. The First Circuit Court of Appeals' Decision Finding §81 Inapplicable By Construing §81 to Reflect Modern Trends and Practices Directly Conflicts With the Plain Language of the Statute and this Court's Rulings	7
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:

	Page
Bryan v. *Itasca County*, 426 U.S. 373 (1976)	9
Central Machinery Co. v. *Arizona State Tax Comm'n.*, 448 U.S. 160 (1980)	9, 10
Estate of Cowart v. *Nicklos Drilling Co.*, 505 U.S. 469 (1972)	8
Montana v. *Blackfeet Tribe of Indians*, 471 U.S. 759 (1985)	9
Northern Cheyenne Tribe v. *Hollowbreast*, 425 U.S. 649 (1979)	8
In re Sanborn, 148 U.S. 222 (1893)	8

STATUTES:

25 U.S.C. §81	2
28 U.S.C. §1254(1)	2

In the
Supreme Court of the United States

OCTOBER TERM, 1996

No. -

PENOBSCOT INDIAN NATION,
PETITIONER,

v.

KEY BANK OF MAINE, *et al.*,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Penobscot Indian Nation, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on May 5, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 112 F.3d 538 (lst Cir. 1997) and is reprinted in the Appendix hereto at page A-1.

The Order and Memorandum of the United States District Court for the District of Maine (Brody, D.J.) is reported at 906 F.Supp. 13 (D. Me. 1995) and is reprinted in the Appendix hereto at page A-53.

JURISDICTION

On October 25, 1995, the United States District Court for the District of Maine issued an order and memorandum granting summary judgment in favor of the defendants, dismissing the plaintiff's claims seeking a declaratory judgment pursuant to 25 U.S.C. §81 to invalidate several agreements concerning the purchase and operation of a mobile home business. The District Court proceeded to try the remaining counts of the complaint against another defendant and entered a final judgment resolving all claims on May 7, 1996. The District Court's order of October 25, 1995, granting summary judgment in favor of the defendants, was timely appealed to the United States Court of Appeals for the First Circuit. On May 5, 1997, the Court of Appeals affirmed the District Court's order granting summary judgment on the plaintiff's claim and reversed that part of the order granting summary judgment in favor of the plaintiff on the defendants' counterclaims and remanded in part those claims to the District Court.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 81 of Title 25 of the United States Code provides:

§81. Contracts with Indian tribes or Indians

No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing of

value, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in

controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

(R.S. § 2103; Pub.L. 85-770, Aug. 27, 1958, 72 Stat. 927.)

STATEMENT OF THE CASE

Introduction.

The Penobscot Indian Nation ("PIN") commenced this suit on September 14, 1994 seeking to recover for the defendants' alleged wrongful and actionable conduct in connection with PIN's loss of approximately $1.2 million arising out of its participation in a Maine limited partnership known as Schiavi Homes. The complaint sought a determination that a number of contracts entered into in connection with the Schiavi Homes investment were void in accordance with the provisions of 25 U.S.C. §81 and that two settlement agreements and associated releases dated September 29, 1989 were also void under 25 U.S.C. §81 on the grounds that the agreements were not approved by the Secretary of the Interior, or if approved, were approved upon information which was incorrect, misleading and incomplete. The complaint sought a declaration that the agreements were null and void and that PIN was entitled to the return of all funds advanced in accordance with those agreements and, in absence of the releases, was entitled to pursue any state law claims arising out of the investment.

The Petitioner's claims are wholly centered upon the question of whether or not 25 U.S.C. §81 is applicable. The First Circuit has affirmed the District Court by determining that 25 U.S.C. §81 does not apply to agreements relative to lands that an Indian tribe purchases in fee simple for investment purposes, an assertion the Petitioner respectfully contends is contrary to the plain language of the statute and the law established by this Court.

Factual Background And Proceedings Below.

The Petitioner commenced its suit in the District Court on September 14, 1994 seeking relief under §81 of Title 25 of the United States Code and asserting jurisdiction in accordance with 28 U.S.C. 1331 and 1362.

In 1983, Consumers Water Company ("CWC") acquired Schiavi Homes Corporation ("SHC") a profitable Maine mobile home sale business from John Schiavi ("Schiavi") (A-3). In 1985, John Palmer ("Palmer") became SHC's new president. In August, 1985, Palmer and his wife founded Palmer Development Corporation ("Palmer Development") which had as its purpose, the sale of mobile homes throughout Maine. (A-3) On December 31, 1986, PIN and Palmer Management Corporation, a corporation formed for the purpose of purchasing SHC from CWC, executed a partnership agreement creating Schiavi Homes (Schiavi Homes was a Maine limited partnership). (A-3-4) PIN became the sole limited partner and Palmer Management the sole general partner with PIN having a 90% interest in Schiavi Homes. (A-4) Palmer Management received a 10% interest, but had full control over all management decisions. (A-4) Key Bank of Maine ("Key Bank") financed the partnership's purchase of SHC on the condition that John Palmer retain full and complete management control over Schiavi Homes. (A-4) Key Bank also insisted that PIN post a $1 million letter of credit to secure the partnership's loan and agree to restrictions on the withdrawal of funds from Schiavi Homes. (A-4)

The partnership Schiavi Homes, as part of the purchase, secured three noncompetition agreements, 1) from CWC which agreed not to compete with Schiavi Homes, 2) from John Palmer who signed a similar agreement with the partnership and 3) the partnership also obtained an assignment of CWC's noncompetition agreement with John Schiavi. (A-4)

The business of Schiavi Homes started to fail immediately after its purchase by the partnership. (A-4) Although sales of mobile homes in Maine reached an all time high during this

time, by the end of 1987 Schiavi Homes' market share declined from 18% to 8%. (A-4) During the course of its three year existence, PIN made several additional investments in Schiavi Homes in an attempt to support the Schiavi Homes business. (A-4) In October of 1987, PIN signed a lease option agreement with Schiavi Homes, leasing for the nominal fee of $1 per year a 24 acre tract of real property (the so-called "Holden lot" that PIN had purchased during the same month). (A-4-5) The lease option agreement afforded the partnership the option to purchase the Holden lot for $100,000. (A-5) PIN subsequently invested an additional $135,000 to develop the Holden lot for purposes of Schiavi Homes' business. In December 1988, some 120 days before the failure of Schiavi Homes, Schiavi Homes pledged the lease option agreement as collateral to Key Bank. (A-5) In May 1989, Key Bank notified PIN that it intended to exercise a purchase option contained in the lease option agreement and initiated three foreclosure actions with respect to the real property that the partnership owned. (A-5)

On September 29, 1989, PIN entered into comprehensive settlement agreements with John Schiavi, SHC, Schiavi Homes, Palmer, Palmer Management, Key Bank, Burlington Homes of New England and CWC. (A-5) The agreements contain identical language which serves to release, remise and forever discharge all claims involving the signatories. (A-5-6)

PIN's complaint below contained nine counts asserting various state and federal law causes of action. (A-6) The first count of the complaint sought a determination that the two settlement agreements signed by PIN and the Respondents were void because they did not receive the Secretary of the Interior's approval pursuant to 25 U.S.C. §81. (A-6) Key Bank, Schiavi, Palmer, Palmer Management, Palmer Development, CWC and Burlington Homes moved for summary judgment seeking a determination that 25 U.S.C. §81 was not applicable to the settlement agreements. (A-7)

The District Court concluded that §81 was not applicable to the settlement agreements and that, accordingly, the settlement agreements constituted valid releases. (A-53) The

District Court granted summary judgment for the defendants with respect to all of PIN's claims. (A-53)

On May 5, 1997, the Court of Appeals for the First Circuit affirmed the District Court's decision finding that 25 U.S.C. §81 was inapplicable to PIN's claims because §81 did not apply to agreements relative to lands that an Indian tribe purchases in fee simple for investment purposes. (A-1) PIN's suggestion for rehearing en banc was not accepted by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. The First Circuit Court of Appeals' Decision Finding §81 Inapplicable By Construing §81 to Reflect Modern Trends and Practices Directly Conflicts With the Plain Language of the Statute and this Court's Rulings.

In order to resolve the appeal below, the First Circuit began by addressing an issue of first impression in the First Circuit, whether 25 U.S.C. §81 applies to agreements relative to lands that an Indian tribe purchases in fee simple for investment purposes. (A-9) Consistent with the opinion of the District Court below, the First Circuit Court of Appeals first analyzed the Settlement Agreements between PIN and the Respondents, reasoning that if the Settlement Agreements were valid, then the remainder of PIN's claims would fail. (A-10) The First Circuit in following the language of the statute applied a tripartite test: whether the Settlement Agreements were; 1) with an Indian tribe, 2) for the provision of services and 3) relative to Indian lands. The First Circuit found that the agreements in question were agreements with an Indian tribe and, arguably with respect to one Settlement Agreement, an agreement relative to services to be performed. (A-11-12) The First Circuit then turned to what it found to be the ultimate question in its decision; whether the agreements were "relative to Indian lands." The First Circuit found it important that the agreements in question related to land purchased by PIN

in fee simple for investment purposes. (A-13) The First Circuit acknowledged that it had "uncovered no precedent that explicitly considers whether or not §81 applies to land that an Indian tribe purchased in fee simple for investment purposes." (A-13)

This Court has noted that "In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469 (1992) *citing*, *Demarest* v. *Manspeaker*, 498 U.S. 184, 190, 111 S.Ct. 599, 603 (1991). The land in question in the instant case was the land referred to as the so-called Holden lot. The Holden lot was land owned by PIN. The First Circuit observed correctly that the statute does not distinguish between Indian trust lands and Indian fee lands. It then concluded, however, by stating "... nor does it refer to all Indian lands." (A-14). The Holden lot was land owned by the Penobscot Indian Nation. It was "their land." The plain meaning of the phrase "Indian lands" is land owned by Indians. Without modification or limitation, it is read to refer to and include <u>all</u> Indian lands. The analysis should, consistent with the principles of statutory construction espoused by this Court, and the plain language of the statute, end here. The agreement which the First Circuit found to be relative to the Holden lot, land owned by Indians, was an agreement relative to "Indian lands." The First Circuit Court of Appeals instead proceeded from this point to review legislative history. (A-16). The First Circuit acknowledged that it had "... failed to arrive at a definitive answer to our inquiry through reference to §81's plain meaning and legislative history." (A-20).

Congress' purpose in enacting §81 was to protect the Indians from "improvident and unconscionable contracts." *In Re: Sanborn*, 148 U.S. 222, 227 (1893). This Court has repeatedly reaffirmed the "eminently sound and vital canon" (quoting *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S.

649, 655 n. 7 (1979)) that "statutes passed for the benefit of Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976), citing *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918). Legislation relative to Indian tribes must be construed broadly and must, in instances of doubt or ambiguity, be construed in such a manner so as to favor the interpretation which benefits the Indian tribes. *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

While the First Circuit Court of Appeals decision took note of this precedent, it concluded that adopting the Petitioner's interpretation would frustrate Indian tribes' efforts to promote economic development and fiscal independence. (A-29) The First Circuit concluded that "[T]o find §81 applicable to a tract of real property that PIN purchased in fee simple to promote its business interest would contravene *modern efforts* to secure tribal self-determination." (emphasis added) (A-30). In the same vein, the First Circuit Court of Appeals noted that its analysis "reflects the *modern trend* in federal Indian policy away from outmoded paternalistic practices and policies." (emphasis added) (A-29)

In *Central Machinery Company* v. *Arizona State Tax Commission*, 448 U.S. 160 (1980) this Court reversed the decision of the Supreme Court of Arizona allowing state taxation of certain sales transactions between a commercial enterprise owned by an Indian tribe and a seller of farming equipment. In *Central Machinery Company* the Court was called upon to enforce the provisions of a 1790 statute regulating the licensing of Indian traders and prohibiting state taxation. The Court held that, consistent with the 1790 statute, state taxation was prohibited. The Court concluded,

> It may be that in light of modern conditions the State of Arizona should be allowed to tax transactions such as the one involved in this case. Until Congress repeals or amends the Indian Trader Statutes, however, we must

> give them "a sweep as broad as [their] language," *United States* v. *Price*, 383 U.S. 787, 801, 86 S.Ct. 1152, 1160, 16 L.Ed.2d. 267 (1966), and interpret them in light of the intent of the Congress that enacted them. *See*, *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 666, 99 S.Ct. 2529, 2537, 61 L.Ed.2d. 153 (1979); *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 206, 98 S.Ct. 1011, 1019, 55 L.Ed.2d. 209 (1978).

448 U.S. at 166.

Section §81 was enacted by the 44th Congress. In the intervening 64 sessions of Congress, no amendment has been made. Taking note of "modern trends" and "modern efforts," the First Circuit Court of Appeals decision finds that §81, enacted to protect Indian tribes, is not presently in their best interest. The First Circuit decision effects a change that Congress, in the intervening 64 sessions and 125 years, has declined to make. It is a decision which effects social policy change contrary to the decisions of this Court and the expressed intent of Congress.

CONCLUSION

For the above-stated reasons, the Petitioner respectfully requests that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

STANLEY W. WHEATLEY
Counsel of Record
PETER J. HALEY
STEPHEN F. GORDON
GORDON & WISE
101 Federal Street
Boston, Massachusetts 02110
(617) 261-0100
Counsel for Petitioners

United States Court of Appeals
For the First Circuit

No. 96-1670

PENOBSCOT INDIAN NATION,
PLAINTIFF, APPELLEE,
v.
KEY BANK OF MAINE, ET AL.,
DEFENDANTS, APPELLEES,

JOHN PALMER, PALMER MANAGEMENT CORPORATION, AND PALMER DEVELOPMENT CORPORATION,
APPELLANTS.

No. 96-1671

PENOBSCOT INDIAN NATION,
PLAINTIFF, APPELLANT,
v.
KEY BANK OF MAINE, ET AL.,
DEFENDANTS, APPELLEES.

No. 96-1672

PENOBSCOT INDIAN NATION,
PLAINTIFF, APPELLEE,
v.
KEY BANK OF MAINE, ET AL.,
DEFENDANTS, APPELLEES.

JOHN SCHIAVI,
APPELLANT.

No. 96-1736

PENOBSCOT INDIAN NATION,
PLAINTIFF, APPELLEE,
v.
KEY BANK OF MAINE,
DEFENDANT, APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE
[HON. MORTON A. BRODY, *U.S. District Judge*]

Before SELYA and STAHL, *Circuit Judges*,
and WOODLOCK,* *District Judge*.

Peter J. Haley, with whom *Stephen F. Gordon*, *Gordon & Wise*, *Ronald C. Caron*, and *Caron & Sullivan*, were on brief for appellant Penobscot Indian Nation and third-party defendants-appellees, Gerald Pardilla and Reuben Phillips.

Catherine R. Connors, with whom *Debra Brown* and *Pierce Atwood*, were on brief for appellee and cross-appellant Key Bank of Maine.

Justin W. Leary, with whom *Leonard I. Sharon* and *Sharon, Leary & Detroy*, were on brief for appellee Michael Marcello.

Stephen B. Wade with whom *Skelton, Taintor & Abbott* was on brief for defendants-appellees and cross-appellants, John Palmer, Palmer Management Corp., and Palmer Development Corp.

Jeffrey A. Thaler with whom *Berman & Simmons, P.A.* was on brief for defendant-appellee and cross-appellant, John Schiavi.

Melissa A. Hewey with whom *Drummond Woodsum & MacMahon* was on brief for appellees Consumers Water Company, Burlington Homes of New England, Inc., and SHC Corporation.

May 5, 1997

STAHL, *Circuit Judge*. Appellant, a federally recognized Indian tribe, appeals the district court's denial of its motion for declaratory judgment, pursuant to 25 U.S.C. § 81, seeking to invalidate several agreements concerning the purchase and

---

* Of the District of Massachusetts sitting by designation.

operation of a mobile home business. Appellees cross appeal the district court's summary judgment ruling in favor of Appellant on several defamation counterclaims as well as a breach of contract and emotional distress counterclaim stemming from litigation involving the failure of this same mobile home business.

Background

Although the district court provided a cogent summary of the facts and procedural history in its memorandum opinion below, *see Penobscot Indian Nation* v. *Key Bank*, 906 F. Supp. 13, 16-17 (D. Me. 1995), the complexity of this case compels us to sketch the necessary background information.

In 1983, Consumers Water Company ("CWC") acquired Schiavi Homes Corporation ("SHC"), a profitable Maine mobile home sales business, from John Schiavi ("Schiavi"). Under CWC's ownership, SHC continued to operate successfully. In 1985, John Palmer ("Palmer") became SHC's new president. In August 1985, Palmer and his wife, Mary Anna, also founded Palmer Development Corporation ("Palmer Development"). Like SHC, Palmer Development engaged in the sale of mobile homes throughout Maine.

In 1985, the Penobscot Indian Nation ("PIN") hired Tribal Assets Management ("TAM") to locate, evaluate, and recommend potential investment opportunities. Late in 1986, TAM identified SHC as a potential PIN investment and conducted a detailed analysis of SHC's viability as a successful business venture. TAM alerted PIN that SHC constituted a good investment possibility, but cautioned PIN that the success of the venture would depend largely on PIN's willingness to invest in new mobile home sites on which the mobile homes it sold to retail customers could be located. PIN expressed its willingness to use its lands and invest its resources for such purposes.

On December 31, 1986, PIN and Palmer Management Corporation ("Palmer Management"), a corporation formed for the purpose of purchasing SHC, executed a Partnership Agree-

ment creating Schiavi Homes ("Schiavi Homes" or "the Partnership"), a Maine limited partnership. Pursuant to the Partnership Agreement, PIN became the sole limited partner and Palmer Management the sole general partner.[1] PIN acquired a ninety percent interest in Schiavi Homes. Palmer Management received only a ten percent share but secured full control over all management decisions.

Also on December 31, 1986, the Partnership executed a Purchase and Sale Agreement with SHC, which provided for the Partnership's purchase of SHC's assets and business for approximately $5 million. Key Bank of Maine ("Key Bank") financed the purchase on the condition that Palmer retain full management control over Schiavi Homes. Key Bank also insisted that PIN post a $1 million letter of credit to secure its loan and agree to restrictions on the withdrawal of funds from Schiavi Homes.

As part of its purchase of SHC, the Partnership secured three non-competition agreements. CWC entered into a non-competition agreement with Schiavi Homes and assigned to the Partnership its interest in an existing non-competition agreement with Schiavi, which it obtained at the time it originally acquired the business. Palmer signed a similar agreement with the Partnership.

Schiavi Homes fared poorly from its inception. Although sales of mobile homes in Maine reached an all time high during this time, by the end of 1987 Schiavi Homes' market share had declined from eighteen to eight percent. Over the course of its three year existence, PIN made several investments in Schiavi Homes in an attempt to buoy its business fortunes. Most significantly, in October 1987, PIN signed a Lease-Option Agreement with Schiavi Homes leasing for the nominal fee of $1 per year a twenty-four acre tract of real property ("the Holden Lot") that PIN purchased during this

[1] Prior to the purchase, TAM informed PIN that Palmer had been the president of SHC. PIN aso knew both that Pamer and his wife owned Palmer Development and that Palmer Development engaged in business activities similar to those of SHC.

same month. The Lease-Option Agreement afforded the Partnership the option to purchase the Holden Lot for $100,000. PIN subsequently invested approximately $135,000 to develop the Holden Lot for purposes of the Schiavi Homes business. In December 1988, with Schiavi Homes unable to make its regular monthly loan payment of principal and interest to Key Bank, the Partnership pledged the Lease-Option Agreement to Key Bank.

In May 1988, Key Bank notified PIN that it intended to exercise the purchase option contained in the Lease-Option Agreement. At this time, Key Bank also initiated three foreclosure actions with respect to real property that the Partnernip owned and encumbered with mortgage deeds given to Key Bank in conjunction with the initial financing of SHC's purchase.

In April 1989, acting on the advice of its counsel, Bernstein, Shur, Sawyer & Nelson ("Bernstein"), PIM decided to liquidate Schiavi Homes. As part of the liquidation plan, PIN and Palmer then assigned Schiavi Homes' assets to Key Bank.[2]

On September 29, 1989, PIN entered into two comprehensive Settlement Agreements with Schiavi, SHC, Schiavi Homes, Palmer, Palmer Management, Key Bank, Burlington Homes of New England[3] ("Burlington Homes"), and CWC (collectively "Appellees"). PIN, Schiavi Homes, Schiavi, Palmer, Palmer Management, and Key Bank executed the first Settlement Agreement ("first Settlement Agreement"); PIN, Schiavi Homes, SHC, Palmer, Palmer Management, KeyBank, CWC, and Burlington Homes executed the second Settlement Agreement ("second Settlement Agreement"). The

---

[2] The Area Director of the Eastern Area Office of the Bureau of Indian Affairs, George Big Eagle, approved the transfer of the Holden Lot to Key Bank pursuant to Title IV of the Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1543, which forbids, without written consent, any transfer or disposal of a project being improved with federal grant funds within three years of the use of such funds.

[3] Burlington Homes of New England, a subsidiary of CWC, manufactured mobile homes. SHC, Schiavi Homes, and Palmer Development all sold homes that Burlington manufactured.

two agreements contained identical language that served broadly to release, remise and forever discharge all claims involving the signatories. Subsequent to the signing of the two Settlement Agreements, legal proceedings deriving from the operation of Schiavi Homes ceased.

The ensuing period of calm ended on September 14, 1994, when PIN filed the lawsuit underlying this appeal. PIN's suit stemmed from an investigation of Key Bank's activities relating to Schiavi Homes that Penobscot County Deputy Sheriff Carl Andrews conducted between approximately 1993 and 1994.[4] PIN alleges that Andrews' investigation revealed substantial improprieties on the part of PIN's business associates in the Schiavi Homes venture. Also on September 14, 1994, PIN held two press conferences, one in Bangor, Maine, and one in Portland, Maine, to announce the filing of its lawsuit in federal district court. Michael Marcello, PIN's media relations consultant, prepared the statements that PIN Governor Reuben Phillips and PIN Lieutenant Governor Gerald Pardilla read at the two press conferences. Marcello also distributed the text of the statements to members of the media.

PIN's complaint contained nine counts and named nine defendants. Most importantly for our purposes, the complaint alleged that the two Settlement Agreements signed by PIN and the Appellees were void because they did not receive the Secretary of the Interior's approval pursuant to 25 U.S.C. § 81.[5]

---

[4] The record does not reveal the exact duration, scope, or findings of the investigation. Andrews testified that he provided the Maine Attorney General's office with a three page report summarizing his findings, but he did not divulge the report's contents to PIN. No party submitted this report into evidence; in fact, it is not apparent from the record that the results of the investigation were set out in writing or were made known to the public. It is clear, however, that no criminal proceedings of any kind resulted from Andrews' investigation.

[5] PIN's complaint also alleged the following: (1) breach of duty of good faith and fair dealing (against Key Bank, CWC, SHC, Burlington, Schiavi, Palmer, and Palmer Management); (2) breach of contract (against Schiavi); (3) misrepresentation (against CWC, SHC, Burlington, Schiavi, and Palmer); (4) fraud (against Bernstein); (5) negligence (against Bernstein);

SHC filed a motion to dismiss PIN's claims. Key Bank, Schiavi, Palmer, Palmer Development, Palmer Management, CWC, and Burlington Homes moved for summary judgment.

Palmer, Palmer Development, Palmer Management (the "Palmer Defendants") Key Bank, and Schiavi filed counterclaims against PIN for defamation and punitive damages based on the alleged defamation stemming from the September 14, 1994 press conferences. Key Bank filed counterclaims for defamation against Marcello, Phillips, and Pardilla. Also deriving from these press conferences, Palmer asserted counterclaims agains PIN for intentional and negligent infliction of emotional distress. Both Palmer and Palmer Management filed counterclaims against PIN for breach of contract, alleging that PIN's suit violated the release contained in the Settlement Agreements. Only Marcello responded with a motion for summary judgment.

The district court (Brody, J.) concluded that 25 U.S.C. § 81 did not apply to the Settlement Agreements. Determining that the Settlement Agreements constituted valid releases, the district court granted summary judgment for the defendants with respect to all of PIN's claims. *See Penobscot Indian Nation*, 906 F. Supp. at 20-21. Treating SHC's motion to dismiss as a motion for summary judgment, the district court separately granted summary judgment for SHC based on the binding nature of the Settlement Agreements. *See id.* at 21-22.The district court also ruled that the statute of limitations barred PIN's RICO claims. *See id.* at 21.

The district court then considered the counterclaims. Finding that Key Bank did not allege facts demonstrating even negligence on Marcello's part, the district court granted Marcello's motion for summary judgment on Key Banks defamation counterclaim. *See id.* at 23. Despite the fact that only Marcello filed a motion for summary judgment, the district

---

(6) breach of fiduciary duty (against Key Rank, Palmer, and Palmer Management); and (7) RICO violations against Key Bank, CWC, Burlington, Bernstein, Schiavi, Palmer, Palmer Management, and Palmer Development).

court proceeded to grant summary judgment *sua sponte* for PIN and the remaining cross-Appellees with respect to the defamation claims.[6] *See id.* Judge Brody also awarded summary judgment *sua sponte* for PIN and the other cross-Appellees on the punitive damage counterclaims. *See id.* at 24. Finally, the district court granted PIN's motion for summary judgment with respect to the emotional distress and breach of contract claims. *See Penobscot Indian Nation* v. *Key Bank*, Civ.No. 94-0212-B (D. Me. Dec. 13, 1995).

In the spring of 1996, PIN's malpractice claims against Bernstein went to trial before a jury. The jury returned a verdict in favor of Bernstein. The district court then entered a final judgment resolving all claims on May 7, 1996. These appeals ensued.[7]

Standard of Review

The district court must grant summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "On appeal from the entry of summary judgment we revive the district court's decision *de novo*, construing the record in the light most . . . [favorable] to the non-movant and resolving all reasonable inferences in that party's favor." *Hachikian* v. *FDIC*, 96 F.3d 502, 504 (1st Cir. 1996). We are not "wedded to the district court's reasoning. Rather, '[w]e are free, on appeal, to affirm a judgment on any independently sufficient ground.'" *Garside* v. *Osco Drugs, Inc.*, 895 F.2d 46, 49 (1st Cir. 1990) (quoting *Polyplastics, Inc.* v. *Transconex, Inc.*, 827 F.2d 859, 860-61 (1st Cir. 1987)).

---

[6] The Palmer Defendants immediately filed a motion for reconsideration, which the district court subsequently denied. *See Penobscot Indian Nation* v. *Key Bank*, Civ. No.94-0212-B, 1 (D. Me. Dec. 13, 1995).

[7] PIN did not appeal the adverse judgment respecting either its RICO claims or its other claims against Bernstein. Cross-Appellants did not appeal the district court's *sua sponte* ruling as to punitive damages.

Discussion

This appeal raises several issues which we address in turn. We begin by resolving an issue of first impression in this Circuit: whether 25 U.S.C. § 81 applies to agreements relative to lands that an Indian tribe purchases in fee simple for investment purposes. We then determine whether PIN's filing of this action in 1994 constituted an actionable breach of contract. Subsequently, we decide whether the district court erred in concluding that the statements Marcello prepared and individual PIN officials announced to the press in September 1994 did not amount to defamation. Thereafter, we touch upon the issue of whether PIN's conduct at the press conferences constituted either intentional or negligent infliction of emotional distress. Finally, we evaluate whether the district court has jurisdiction to hear the remaining state law claims at issue in this case.

A. *Section 81*

PIN sought a declaratory judgment from the district court that the agreements it executed with the Appellees necessitated approval from the Secretary of the Interior pursuant to 25 U.S.C. § 81. Section 81 states in pertinent part:

> No agreement shall be made by any person with any tribe of Indians . . . for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands . . . unless such agreement be executed and approved as follows:
>
> . . .
>
> It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Lands indorsed upon it.
>
> . . .

> All contracts or agreements made in violation of this section shall be null and void. . . .

Congress adopted § 81, originally Revised Statute § 2103, in 1872. To this day, Congress has not repealed § 81 and the few amendments to its text have been only technical. *See Altheimer & Gray* v. *Sioux Mfg. Corp.*, 983 F.2d 803, 805 (7th Cir. 1993).[8]

Section 81 dictates that any agreement within its purview that is not approved by the Secretary of the Interior ("the Secretary") is void *ab initio*. PIN insists that § 81 applies not only to the two Settlement Agreements, but also to the agreements pertaining to the creation and operation of Schiavi Homes, specifically the Asset Purchase Agreement, the Partnership Agreement, and the Lease-Option Agreement. PIN therefore reasons that the Settlement Agreements, the Purchase and Sale Agreement, and the Lease-Option Agreement are not binding. PIN also contends that the Secretary improperly determined that § 81 did not apply to the Partnership Agreement.

Significantly, if the Settlement Agreements are not valid because they never received the Secretary's approval pursuant to § 81, PIN may pursue its remaining claims against the Appellees. If, on the other hand, the Settlement Agreements do not fall within the parameters of § 81, PIN concedes that its remaining non-§ 81 claims fail due to the binding nature of the Settlement Agreements. We therefore begin our analysis by evaluating the applicability of § 81 to the Settlement Agreements.

1. *Settlement Agreements*

Without regard to § 81, the two Settlement Agreements constituted valid releases. Both Settlement Agreements pro-

---

[8] In addition to technical amendments to § 81, Congress passed the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, which provides in part: "The authority of the Secretary under section 81 of this title, relating to management contracts regulated pursuant to this chapter, is hereby transferred to the [National Indian Gaming] Commission." 25 U.S.C. § 2711(h).

vided that the parties "release, remise and forever discharge each other . . . from all suits . . . at law or in equity . . . which directly or indirectly relate[] to . . . any . . . transactions . . . among each other." Whether or not § 81 pertains to and thus voids the Settlement Agreements depends upon whether either or both constitute an agreement with an Indian tribe for services relative to Indian lands. *See* 25 U.S.C. § 81.

a. *Agreement with an Indian Tribe*

The Appellees contend that the Partnership, rather than PIN in its individual capacity, represents the applicable entity in this case. This argument is unavailing. PIN's Lieutenant Governor signed both Settlement Agreements as PIN's personal representative, not as the Partnership's Limited Partner. John Palmer, the Partnership's General Partner, signed on behalf of Schiavi Homes. Moreover, even if Schiavi Homes, not PIN in its individual capacity, signed the agreements, the district court's observation that "[c]ourts look beyond the mere formality of corporate structure in construing the identity of parties with regard to § 81," *Penobscot*, 906 F.Supp. at 19, necessitates no elaboration on our part. *See Altheimer Gray*, 983, F.2d at 809-10; *Pueblo of Santa Ana* v. *Hodel*, 663 F.Supp. 1300, 1306 (D.D.C. 1987).

b. *Services*

The district court ruled that "the Settlement Agreements themselves do not constitute contracts for services. The Settlement Agreements rather pertain to the release of legal claims. . . ." *Penobscot*, 906 F.Supp. at 20. This conclusion aptly describes the first Settlement Agreement, which made no reference to any service to be performed by any party to the Agreement for any other party to the Agreement. The first Settlement Agreement, consequently, did not involve services.

The second Settlement Agreement contains a provision obligating Key Bank to "jointly [with PIN] seek a purchaser

for the Holden Lot[9] ... at a price to be mutually agreed upon." Because the Supreme Court has instructed that federal statutes concerning Indian tribes must be construed "liberally in favor of the Indians," *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985), we assume for purposes of this opinion that this provision in the second Settlement Agreement entailed a "service" within the meaning of § 81, *see Green* v. *Menominee Tribe*, 233 U.S. 558, 569 (1914) (finding § 81 applicable to sales contract); *see also Wisconsin Winnebago Bus. Comm.* v. *Koberstein*, 762 F.2d 613, 619 (7th Cir. 1985) (applying § 81 to management contract); *United States ex rel. Citizen Band Potawatomi Indian Tribe* v. *Enterprise Management Consultants, Inc.*, 734 F.Supp. 455, 457 (W.D. Okla. 1990) (same), *aff'd in part and rev'd in part*, 968 F.2d 22 (10th Cir. 1992); *but see United States ex rel. Harlan* v. *Bacon*, 21 F.3d 209, 211 (8th Cir. 1994) (determining that lease agreement which provided that forty percent of produce deriving from use of leased land be delivered to tribe did not entail service within meaning of § 81).

c. *Relative to Indian lands*

The final prong of the § 81 analysis, whether the Settlement Agreements were "relative to (Indian] lands," presents a more difficult question. The first Settlement Agreement is not relative to Indian lands because it neither pertained nor referred to any land whatsoever. The second Settlement Agreement, however, both involved and referred to land that an Indian tribe owned. Specifically, the second Settlement Agreement provided for the disposition of the Holden Lot. At first glance, § 81 may appear to apply to the Holden Lot because PIN, an Indian tribe, owned this parcel of land. We believe, however, that the meaning of § 81's language, the intentions of its drafters, the Interior Secretary's interpretation of § 81, the case law from other circuits that have interpreted the

[9] At oral argument, PIN informed us that the Holden Lot constitutes the sole tract of land at issue in this case, and, thus, the only piece of Indian land to which § 81 could apply.

statute, the dictates of common sense, and the federal policy promoting tribal self-determination support a holding that the statute does not apply to the Holden Lot. Although we have uncovered no precedent that explicitly considers whether or not § 81 applies to land that an Indian tribe purchased in fee simple for investment purposes, in doing so now we give voice to an assumption underlying virtually every decision addressing the applicability of § 81 to service agreements with Indian tribes relative to their lands.

We base our conclusion primarily on the distinctions between Indian trust or tribal lands (hereinafter "Indian trust lands")[10] and lands that Indian tribes hold in fee simple [hereinafter "Indian fee lands"]. The phrase "Indian trust lands" derives from the historic trust relationship existing between Indian tribes and the federal government, originally described as "resembl[ing] that of a ward to his guardian." *Worcester* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *see also Oneida County* v. *Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *United States* v. *Sam Pelican*, 232 U.S. 442, 447 (1914); *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370, 379 (1st Cir. 1975). Indian trust lands constitute real property the title to which the United States holds in trust for an Indian tribe. *See* 25 U.S.C. § 465; *Felix S. Cohen's Handbook of Federal Indian Law* 476 (Rennard Strickland et al. eds., 1982) [hereinafter *Cohen's Handbook]*.

Fee simple lands, by contrast, are those lands in which the owner "is entitled to the entire property, with unconditional power of disposition." *Black's Law Dictionary* 615 (6th ed. 1990). Federal law recognizes that Indian tribes may hold

---

[10] We use the terms "Indian trust lands" and "Indian tribal lands" interchangeably because we have not located any authority that draws a distinction between these terms that is material for our purposes. *See, e.g., Black's Law Disctionary* 772 (1990); *Felix S. Cohen's Handbook of Federal Indian Law* 35-36, 476 (Rennard Strickland et al. eds., 1982); Reid P. Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 Stan. L. Rev. 1061, 1061 (1974) (referring to Indian lands delineated "restricted" in 25 U.S.C. § 415 as "Indian trust land").

certain lands in fee simple and that these lands may not be subject to the trust relationship between Indian tribes and the federal government. *See, e.g.*, 25 U.S.C. § 1466. Specifically, and pertinent to these appeals, the Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721-1735, indicates that the Holden Lot constitutes Indian fee land over which the federal government does not have a trust responsibility because the Lot does not lie within designated PIN Territory. In fact, Congress expressly disavowed trust responsibility for Indian real property encompassing the area in which the Holden Lot is situated.[11] Accordingly, we find that PIN held the Holden Lot in fee simple. We now consider the impact this fact has on whether § 81 applies to the second Settlement Agreement.

This inquiry necessitates that we first consider the statute's text. *See United States* v. *Gonzales*, 117 S.Ct. 1032, 1034 (1997). As previously noted, § 81 states: "No agreement shall be made by any person with any tribe of Indians . . . for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands. . . ." The statute does not distinguish between Indian trust lands and Indian fee lands; nor does it refer to all Indian lands. In fact, § 81's scope is not clearly defined. *See* Mark A. Jarboe, *Fundamental Legal Principles Affecting Business Transactions in Indian Country*, 17 Harmline L. Rev. 417, 430 (1994); *see also Stowell* v. *Secretary of Health and Human Servs.*, 3

[11] 25 U.S.C. § 1724(d)(3) provides: "Land or natural resources acquired outside the boundaries of [Penobscot Indian Territory] . . . shall be held in fee by the respective tribe or nation, and the United States shall have no further trust responsibility with respect thereto." 25 U.S.C. § 1722(j) defines Penobscot Indian Territory as "those lands as defined in the Maine Implementing Act." The Maine Implementing Act defines Penobscot Indian Territory as the Penobscot Indian Reservation and "[t]he first 150,000 acres of land acquired by the secretary for the benefit of the Penobscot Nation" as further defined in this section. Me. Rev. Stat. Ann. tit. 30, § 6205(2)(B) (1993). The Holden Lot does not fall within either the Penobscot Indian Reservation or the remaining area that § 6205(2)(B) designed as current or potential Penobscot Indian Territory.

F.3d 539, 542 (1st Cir. 1993) ("Given two plausible alternatives, and recognizing that the universe of interpretive possibilities may extend beyond them, we think the statute contains an undeniable ambiguity.").

Section 81's lack of clarity and its failure to define the phrase "Indian lands" requires us to determine the "ordinary or natural" meaning of these terms. *See Smith* v. *United States*, 508 U.S. 223, 228 (1993). When Congress has failed to define statutory language, the Supreme Court has resorted to authoritative texts to determine the ordinary meaning of statutory language. *See id.* at 229. According to one such text, the term "Indian lands" refers to "[r]eal property ceded to the U.S. by Indians, commonly to be held in trust for Indians." *Black's Law Dictionary* 771 (6th ed. 1990). The definition of Indian tribal or trust land is virtually identical: "real property the title to which is vested in [the] United States but held in trust for the Indians." *Id.* at 772.[12]

In the context of § 81, the phrase "relative to [Indian] lands" is understood to refer to Indian trust lands. *See Cohen's Handbook* at 318 n.293 (explaining that "25 U.S.C. § 81[] prohibit[s] contracts with Indian tribes concerning *trust property* unless approved by the Commissioner of Indian affairs") (emphasis added); Patrick K. Duffy and Lois A. Lofgren, *Jurassic Farce: A Critical Analysis of the Government's Seizure of "Sue," A Sixty-Five-Million-Year-Old Tyrannosaurus Rex Fossil*, 39 S. D. L. Rev. 478, 528 n.169 (1994) (indicating that pursuant to § 81, the Secretary "has oversight responsibility for approving or vetoing the terms and conditions of all contracts involving Native American *tribal or trust property*") (emphasis added). No authority directly states that § 81

[12] It is noteworthy that the phrase "Indian country" refers to "all lands set aside by whatever means for the residence of tribal Indians under federal protection, together with trust and restricted Indian allotments." *Cohen's Handbook* at 34; *see also United States* v. *John*, 437 U.S. 634, 648-50 (1978). The phrase "as Indian lands are held" is read "simply to state the United States will hold title in trust for the tribe." *Cohen's Handbook* at 476. These definitions would seem to indicate that "Indian country" and "Indian lands" encompass Indian trust lands but not Indian fee lands.

applies to Indian fee lands. It is understood, however, that by adopting § 81 "Congress prohibited most contracts between non-Indians and tribes . . . unless approved by the Secretary of the Interior and the Commissioner of Indian Affairs." *Cohen's Handbook* at 143. Thus, although it appears that § 81's "relative to [Indian] lands" language connotes Indian trust lands rather than Indian fee lands, we acknowledge that this interpretation is not iron-clad.

Recognizing that we cannot end our inquiry with the "ordinary" or "natural" meaning of the statute's terms, we consider the relevant legislative history in an effort to give effect to the intentions of the statute's drafters. *See Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); *United States ex rel. S. Prawer & Co.* v. *Fleet Bank*, 24 F.3d 320, 327 (1st Cir. 1994); *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 769 F.2d 13, 17 (1st Cir. 1985), *aff'd*, 479 U.S. 238 (1986). This inquiry is particularly appropriate in the context of federal Indian law. The Supreme Court has made it clear that "Indian law[] cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted [such law]." *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978); *see also Central Machinery Co.* v. *Arizona State Tax Comm'n*, 448 U.S. 160, 166 (1980) (explaining that courts must "interpret [certain federal statutes involving Indian tribes] . . . in light of the Congress that enacted them").

Congress "intended [§ 81] to protect the Indians from improvident and unconscionable contracts." *In re Sanborn*, 148 U.S. 222, 227 (1893); *see also* Cong. Globe, 41st Cong., 3d Sess. 1483, 1483 (daily ed. Feb. 22, 1871) (declaring that statute was for Indians' "protection and to prevent them from being plundered") (comments of Senator Davis). Specifically, Congress adopted § 81 to protect Indian tribes and individual Indians from persons, particularly attorneys and claims agents, offering dubious services, typically the assertion of the Indians' land claims against the government, in exchange for enormous fees. *See* Cong. Globe, 41st Cong. at 1483-86. One

senator indicated that this section "would prevent . . . contracts being made by [Indian tribes] unless approved by the Secretary of the Interior in any matter relating to *the land or annuities that they hold under or derive from the United States.*" *See* Cong. Globe, 41st Cong. at 1486 (comments of Senator Harlan) (emphasis added). Another senator declared that § 81 "is limited to such agreements or services as are made or rendered relative to *the lands of the Indians* or to any claim against annuities from or treaties with the United States." *Id.* (comments of Senator Casserly) (emphasis added).

Evidence of the drafters' assumptions and intentions does little to resolve whether or not the phrase "relative to [Indian] lands" pertains to both Indian trust land and Indian fee lands, or solely to the former. The two statements addressing the application of § 81 may be read differently: Senator Harlan's description may indicate that the statute applies solely to lands over which the federal government exercises a trust responsibility; Senator Casserly's explanation may mean that the statute applies to Indian lands generally. To reconcile this ambiguity, and thus to parse the ordinary meaning of § 81 at the time of its ratification, we consider the understanding of the status of Indian lands that prevailed at the time Congress passed § 81.[13] *See Oliphant*, 435 U.S. at 206.

In 1872, when Congress passed § 81, federal law provided that Indian tribes enjoyed the right to possess and occupy lands but not to alienate these lands without the federal

[13] Our determination to further consider the nature of Indian land ownership during this time in order to properly interpret the phrase "relative to [Indian] lands" would be appropriate even if we read Senator Harlan's statement in the disjunctive, rather than in the conjunctive as the sentence was recorded. That is, if we read the phrase "relating to the land or annuities that they hold under or derive from the United States" so that the qualifying statement "that they hold under or derive from the United States" qualifies only the word "annuities" but not the words "the land," we still would have learned little more concerning the definition of "Indian lands." Such a reading, though tortured, would resolve the ambiguity between the drafters' two statements and would tend to point to a broader definition of the terms "Indian lands," but it would not dispose of our inquiry into the meaning of the phrase "relative to [Indian] lands."

government's approval. *See Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823) (indicating that United States possessed title to all Indian lands "subject only to the Indian right of occupancy"); *United States* v. *Cook*, 86 U.S. (19 Wall.) 591, 592-94 (1873) (explaining that Indians enjoyed only right of occupancy in Indian lands and that "the fee was in the United States"); David H. Getches and Charles F. Wilkinson, *Federal Indian Law* 161 (1986) ("The United States had the exclusive right to purchase or extinguish Indian title.") [hereinafter *Federal Indian Law]*. Memorializing this conception of Indian real property rights, Congress adopted general, comprehensive legislation addressing the rights of Indian tribes with respect to their lands during this era. *See, e.g.*, Nonintercourse Act of 1834, R.S. § 2116 (codified as 25 U.S.C. § 1[illegible] (prohibiting "purchase, grant, lease, or other conveyance of *lands*, or of any title or claim thereto, from any Indian nation or tribe of Indians")(emphasis added).[14] Congress did not distinguish between Indian trust lands and Indian fee lands at this time presumably because it did not contemplate that Indian tribes could hold land in fee simple.

During this time, however, Congress did provide for individual Indians to hold land in fee simple. *See* 25 U.S.C. §§348-349 (1887). The allotment process that these statutes authorized permitted the Secretary to transfer certain real property to individual Indians. Typically the United States

[14] It was not until the legal relationship between Indian tribes and the federal government evolved dramatically in the twentieth century that legislation regulating Indian tribes' real property routinely distinguished between restricted and unrestricted tribal lands. *See, e.g.*, 28 U.S.C. § 1360(b) (1953) (referring specifically to the "alienation, encumbrance, or taxation of any real or personal property . . . that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States"); 25 U.S.C. § 415 (1955) (referring specifically to "restricted Indian lands"). Modern statutes routinely distinguish between Indian trust lands and Indian fee lands. *See, e.g.*, 25 U.S.C. § 1724(d)(3) (1980) (distinguishing between Indian trust lands and Indian fee lands, and indicating that the United States does not have "trust responsibility" with respect to the latter); 25 U.S.C. § 1466(1974) (indicating that Indian tribes can purchase real property "without any restriction on alienation, control, or use").

would hold such lands in trust for the designated individuals for a period of twenty-five years. *See Sam Pelican*, 232 U.S. at 447. The Secretary, at his discretion, could "cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed." 25 U.S.C. § 349. Despite these statutes' provision for individual Indians' fee simple ownership of real property, we have unearthed no legislation enacted during this time that afforded similar rights to Indian tribes. *See Cohen's Handbook* at 36 & n.78.

Interpreting § 81 and its legislative history in light of the understandings and assumptions of those who drafted it, *see Oliphant*, 435 U.S. at 206, thus supports the conclusion that § 81 does not pertain to the Holden Lot. When Congress passed § 81 it did not envision that Indian tribes could hold land in the manner that PIN held the Holden Lot. *Cf. Cohen's Handbook* at 127-43 (concluding that during this time "extensive government supervisory power over the everyday life of Indians was essentially unchecked"). It therefore would seem anomalous, in endeavoring to give effect to Congress' intent, to apply § 81 to lands PIN purchased in fee simple for investment purposes.

Admittedly, the broad remedial purposes that § 81's drafters attributed to the statute may complicate this analysis. Congress desired to protect Indian tribes from unscrupulous business practices, *see* Cong. Globe 41st Cong. at 1485-86, and enjoyed the sole right to encumber all Indian lands, *see Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 667 (1974) ("Once the United States was organized and the Constitution adopted . . . tribal rights to Indian lands became the exclusive province of the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States."). It may seem plausible, therefore, that § 81 should apply to agreements for services relative to all Indian lands. Congress, moreover, occasionally did authorize individual Indians to hold designated parcels of real property in fee simple, and, therefore, could have exempted these fee

simple lands from § 81's purview if it did not want § 81 to apply to Indian fee lands. To our knowledge, Congress has adopted no such exemption. Our analysis thus illustrates that although § 81's legislative history, considered in light of the status of federal Indian law during the middle of the nineteenth century, points to the conclusion that § 81 does not apply to Indian fee lands, it does not provide a clear answer to the issue we face today.

Having failed to arrive at a definitive answer to our inquiry through reference to § 81's plain meaning and legislative history, we turn to analyze the interpretation of the agency responsible for administering the statute. *See Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Although we have not unearthed a general interpretation of § 81 advanced by the Secretary of the Interior, in this case the parties submitted the Partnership Agreement for the Secretary's approval. The Area Director of the Eastern Area Office of the Bureau of Indian Affairs[15] stated:

> The Secretary has determined that the Agreement does not encumber trust land or other trust assets, that the Agreement is not subject to the provisions of 25 U.S.C. § 81 (1982), and that, as a result, the Nation has contractual capacity to enter into this Agreement without additional Secretarial approval.

Declaration of B. D. Ott, Area Director, Eastern Area Office, Bureau of Indian Affairs (December 31, 1986).

This declaration illustrates that in determining whether or not an agreement with an Indian tribe falls within the parameters of § 81, the Secretary focuses on whether or not the agreement relates to Indian trust lands or assets. *See also*

[15] The Secretary of the Interior's duties pursuant to the text of § 81 subsequently have been delegated to the appropriate Area Director of the Bureau of Indian Affairs. *See* Reorganization Plan No. 3 of 1950, 5 U.S.C. § 903 (a)(5) & note; Order of the Secretary of the Interior, Nos. 3150 & 3177, Amend. No. 3 (Dec. 16, 1996); 10 B.I.A.M. Bulletins 13, 9409, & 9602.

Barona Group of the Capitan Grande Bande of Mission Indians v. *American Management & Amusement, Inc.*, 840 F.2d 1394, 1404-05 (9th Cir. 1987) (quoting Acting Superintendent for Southern California Bureau of Indian Affairs office explaining that § 81 does not apply if "trust lands and funds are not involved"). In this case, the second Settlement Agreement did not involve Indian trust lands or assets. Although the administrative agency's interpretation does not function to conclusively resolve our evaluation of whether § 81 pertains to the second Settlement Agreement, *see Stowell*, 3 F.3d at 544; *American Management*, 840 F.2d at 1405, we must afford it considerable deference, *see Chevron U.S.A.*, 467 U.S. at 843; *Strickland* v. *Commissioner, Maine Dep't of Human Servs.*, 96 F.3d 542, 547 (1st Cir. 1996).

Judicial interpretation of § 81 provides further guidance. *See Securities Indus. Ass'n* v. *Board of Governors of Fed. Reserve Sys.*, 839 F.2d 47, 49 (2d Cir.1988) (explaining that in determining reasonableness of administrative agency's interpretation of statute, court should consider judicial construction). Courts generally have focused on the existence of Indian trust land in evaluating § 81's "relative to [Indian] lands" component. In *Koberstein*, 762 F.2d at 619, the Seventh Circuit explicitly stated that § 81 applied to a bingo management agreement because "§ 81 applies to Indian land transactions concerning their *tribal trust property*." (emphasis added). *See also Pueblo of Santa Ana*, 663 F.Supp. at 1306 (finding § 81 applicable to agreement because it provided for construction and operation of facility on *"tribal trust property"*) (emphasis added); *Enterprise Management*, 734 F.Supp. at 457 (voiding bingo management agreement providing non-Indian party exclusive right to operate bingo games on Indian trust lands because this agreement was "relative to Indian lands and . . . thus governed by section 81"). The Ninth Circuit in particular has manifested the importance that the presence of Indian trust lands plays in the "relative to [Indian] lands" analysis. In *A.K. Management Co.* v. *San Manuel Band of Mission Indians*, 789 F.2d 785, 786 (9th Cir.

1986), the Ninth Circuit considered the applicability of § 81 to a bingo management contract that the San Manuel Band of Mission Indians executed with a bingo management company. Upholding the district court's grant of summary judgment, the court held "that the instant Agreement is 'relative to [Indian] lands' under 25 U.S.C. § 81." *Id.* at 787. In reaching this conclusion, the court reasoned that "the Agreement gives the non-Indian contracting party . . . the express right to build and control the operation of the bingo facility located on *tribal trust lands* and prohibits the Band from encumbering the land." *Id.* (emphasis added).

One year later, in *American Management*, 840 F.2d at 1404, the Ninth Circuit again determined that a contract between an Indian tribe and a non-Indian bingo management company providing for the construction and operation of a bingo facility on Indian trust lands was "'relative to [Indian] lands' under section 81." The court specifically stated that it reached this conclusion despite the fact that the agreement neither afforded the non-Indian party exclusive control over the bingo facility nor abridged the tribe's ability to encumber its trust lands. *See id.* The fact that the non-Indian party exercised some control over Indian trust lands, however minimal, proved decisive to the *American Management* court's analysis. *See id.; see also United States ex rel Yellowtail* v. *Little Horn State Bank*, 828 F.Supp. 780, 787 (D. Mont. 1992) ("The only interest the government has in overseeing certain contracts and agreements with Indians flows from its duty as trustee of tribal resources. . . . The nature of the government's interest is in the Tribe's trust resources 'relative to the land.'"), *aff'd*, 15 F.3d 1095 (9th Cir. 1994).

The most recent circuit court decision to specifically address the "relative to [Indian] lands" component of § 81, *Altheimer & Gray*, 983 F.2d at 808-12, offers a slightly different construct that further supports the conclusion that the second Settlement Agreement in this case is not "relative to [Indian] lands." The *Altheimer* court considered a Letter of Intent that a federally recognized Indian tribe, in the form of a wholly

owned tribal corporation, executed with an Illinois corporation providing for the manufacture of latex medical products on tribal trust lands. *See id.* at 806-07. Although manufacture of the products actually commenced, the parties failed to execute the necessary contracts. Operations thus ceased shortly after commencement. The Illinois corporation sued the tribal corporation for breach of contract. The district court found the Letter of Intent void pursuant to § 81 and granted summary judgment to the tribal corporation. *See id.* at 806-07. The Seventh Circuit reversed the district court. *See id.* at 815. In so doing, the court set forth four factors that it considered determinative of whether or not a management contract is "relative to [Indian] lands" pursuant to § 81:

> 1) Does the contract relate to the management of a facility to be located on Indian lands?
> 2) If so, does the non-Indian party have the exclusive right to operate that facility?
> 3) Are the Indians forbidden from encumbering the property?
> 4) Does the operation of the facility depend on the legal status of an Indian tribe being a separate sovereign?

Id. at 811. Despite the fact that the Letter of Intent involved the operation of a facility on Indian trust lands, the *Altheimer* court found that it was not relative to Indian lands and thus not within the purview of § 81. The Seventh Circuit emphasized the fact that the non-Indian contracting party did not have exclusive control of the facility and that "the business derived no special benefit from its location on Reservation land." *Id.* at 812.

Considering the present case in light of *Altheimer* compels two initial observations. First, the second Settlement Agreement obviously did not constitute a management contract. Second, importing the precise considerations pertinent to an evaluation of a management contract to an analysis of an agreement to assist in locating a purchaser for land may present certain difficulties. *See id.* at 811 (indicating that the

four factors that it set forth are not the '*sine qua non*' of a contract which relates to Indian lands").

Despite its distinguishing characteristics, however, *Altheimer* informs our analysis of PIN's appeal. Specifically, the *Altheimer* court refused to find the agreement "relative to [Indian] lands" in part because the Indian tribe in *Altheimer* remained involved in the business relationship. In this case, PIN participated in the Partnership, not through daily management duties, but through financing and leasing activities promoting Schiavi Homes business activities. More importantly, Altheimer emphasized the fact that the subject matter of the contract derived no special benefit from the Indian tribe's sovereign status. *See id.* at 812. The *Altheimer* court explained: "Unlike bingo, manufacturers of latex medical products need not seek refuge from state civil laws by locating on a reservation." *Id.* In this case, the parties to the second Settlement Agreement derived no special benefit from PIN's sovereign status.[16]

Notwithstanding the fact that *Altheimer*, like the other cases we have considered, supports the conclusion that the second Settlement Agreement does not fall within the purview of § 81, we consider one additional case in which the district court for the district of Rhode Island interpreted § 81's "relative to [Indian] lands" requirement. *See Narragansett Indian Tribe* v. *RIBO, Inc.*, 686 F.Supp. 48, 51 (D.R.I. 1988), *aff'd on other grounds*, 868 F.2d 5 (1st Cir. 1989). The *Narragansett* court considered § 81's applicability to two management agreements "contemplating acquisition by the Tribe of property on which a high stakes bingo hall could be constructed." *See id.* at 49. Following execution of the agreements, the

[16] We note that when the land at issue constitutes Indian fee land it is difficult for the subject matter of the contract to derive a special benefit from the Indian tribe's sovereignty because Indian tribes do not have the same powers and privileges with respect to Indian fee lands that they do in the context of Indian trust lands. *See Narragansett Indian Tribe* v. *RIBO, Inc.*, 686 F.Supp. 48, 50 (D.R.I. 1988), *aff'd on other grounds*, 868 F.2d 5 (1st Cir. 1989); *Cohen's Handbook* at 232-57.

Tribe purchased a total of 28.8 acres of land adjacent to the Tribe's reservation. *See id.* at 50. The Tribe, however, failed to secure trust status for this land. *See id.*

The *Narragansett* defendants specifically argued that "§ 81 pertained only to 'tribal land' . . . [that is,] land that is part of the Tribe's reservation." *Id.* The district court rejected this argument, reasoning:

> [S]uch a construction proves to be at variance with both the plain language of the statute and with its broad remedial purpose. Thus the statute uses the Term 'their [the Inidians') lands' without differentiating between original tribal lands and those subsequently acquired. Reading into those words the limitation urged by Defendants would distort their plain meaning. Moreover, it also would emasculate the statute and frustrate its purpose of providing a mechanism to regulate Indian land transactions.

Id. Although the *Narragansett* court recognized that § 81 "has its origin in the longstanding trust relationship between the federal government and Indian tribes," *id.* at 50, it held that "§ 81 renders both the agreements and the notes and mortgages given by the Tribe in accordance with their terms null and void." *Id.* at 51.

We find the *Narragansett* court's reasoning unpersuasive. The construction that the *Narragansett* defendants advanced, we believe, comports with the plain language of the statute. If § 81 is predicated on the trust relationship between the federal government and the Indian tribes, *see id.; United States ex rel. Hall* v. *Tribal Dev. Corp.*, 49 F.3d 1208, 1214 (7th Cir. 1995), then reading § 81 to apply to Indian lands purchased in fee simple for business reasons contradicts the statute's purpose and its drafters' intentions. Even those courts that have propounded a broad reading of § 81's "relative to [Indian] lands" component, moreover, have not found that this phrase refers to Indian fee lands. *See, e.g., Koberstein*, 762 F.2d at 619; *United States ex rel Shakopee* v. *Pan*

American Mgmt. Co., 616 F.Supp. 1200, 1217-18 (D. Minn. 1985) (finding that "the management agreements [were] . . . inextricably tied up in the property rights flowing from the establishment of the bingo operations on *tribal trust lands*") (emphasis added). We thus find that to the extent *Narragansett* can be read to hold that Indian fee lands purchased for investment purposes and not designated as trust lands qualify as "Indian lands" under § 81, that holding is not compelling.[17]

To reach a different conclusion in the context of the Holden Lot would defy common sense. *See United States* v. *Carroll*, 105 F.3d 740, 744 (1st Cir. 1997) (instructing that common sense construction that "avoid[s] absurd or counter-intuitive results" is favored); *O'Connell* v. *Shalala*, 79 F.3d 170, 176 (1st Cir. 1996) (explaining that "courts are bound to afford statutes a practical, common-sense reading"). Were we to hold that the second Settlement Agreement required the Secretary's approval pursuant to § 81 despite the fact that it relates only to Indian fee lands purchased for business reasons, we would force the Secretary to exercise a trust responsibility with respect to lands over which Congress specifically disavowed any further trust obligation.[18] *See* 25 U.S.C. § 1724(d)

---

[17] Perhaps recognizing the *Narragansett* decision as an anomaly, at least one circuit court has interpreted *Narragansett* as "simply hold[ing] that bingo management agreements involve services within the meaning of [§ 81]." *Bacon*, 21 F.3d at 212.

[18] We recognize that the Supreme Court determined that the Nonintercourse Act, 25 U.S.C. § 177, applied to land that the Pueblo Indian tribes of New Mexico held in fee simple. *See United States* v. *Candelaria*, 271 U.S. 432, 440-44 (1926); *see also United States* v. *Sandoval*, 231 U.S. 28, 45-48 (1913) (finding that Congress could restrict the alienation of land that New Mexico Pueblo Indians held in fee simple). The Pueblo Indians at issue in *Candelaria* and *Sandoval* held their lands in fee simple under both Spanish and Mexican law before the United States gained control over New Mexico. *See Candelaria*, 271 U.S. at 442; *Sandoval*, 231 U.S. at 44-45. First the Spanish and then the Mexican authorities, however, retained the authority to restrict the alienation of these lands. *See Candelaria*, 271 U.S. at 442; *Sandoval*, 231 U.S. at 44-45. We believe that the situation in this case, in which PIN purchased land in fee simple for investment purposes, differs substantially from that in both *Candelaria* and *Sandoval*, in which

(3); 25 U.S.C. 1722(j); Me. Rev. Stat. Ann. tit. 30, § 6205(2)(B) (1993).

In the Maine Indian Claims Settlement Act, Congress not only disavowed further trust responsibility over the area encompassing the Holden Lot, it expressly stated that the Nonintercourse Act, 25 U.S.C. § 177, no longer applied to PIN. *See* 25 U.S.C. § 1724(g)(1). This is significant because we previously have indicated that "the 'trust relationship' . . . has as its source the Nonintercourse Act, meaning that the trust relationship pertains to land transactions which are or may be covered by the Act." *Passamaquoddy Tribe*, 528 F.2d at 379. Because the Nonintercourse Act no longer pertains to PIN, *Passamaquoddy Tribe* dictates that the federal government does not have a trust obligation with respect to the

---

the tribes held their ancestral tribal lands in a modified version of fee simple under Spanish and Mexican rule.

We note, however, that several courts, relying on *Candelaria* and *Sandoval*, have found § 177 applicable to lands that other Indian tribes have purchased in fee simple. *See Alonzo* v. *United States*, 249 F.2d 189, 196 (10th Cir. 1957); *United States* v. *7,405.3 Acres of Land*, 97 F.2d 417, 422 (4th Cir. 1938). Given *Alonzo's* paucity of analysis and outdated paternalism (the court adopted the notion that Indians are "'a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races,'" *see id.* (quoting *Candelaria*, 271 U.S. at 442)), we do not find this decision persuasive. This conclusion applies equally to *7,405.3 Acres of Land*.

The situation in this case, moreover, differs substantially from that in *Alonzo* and *7,405.3 Acres of Land*. As opposed to the land in question in those cases, Congress disavowed trust responsibility over the land encompassing the Holden Lot. *See* 25 U.S.C. § 1724(d)(3). In *Lummi Indian Tribe* v. *Whatcom County*, 5 F.3d 1355, 1359 (9th Cir. 1993), the Ninth Circuit took issue with *Alonzo* and *7,405.3 Acres of Land* and ruled that "parcels of land approved for alienation by the federal government and then reacquired by the Tribe did not then become inalienable by operation of the Nonintercourse Act. *See also Federal Power Comm'n* v. *Tuscarora Indian Nation*, 362 U.S. 99, 110-15 (1960) (determining that lands that Indian tribe purchased in fee simple were not subject to federal oversight pursuant to Federal Power Act, 16 U.S.C. § 797(e), because United States neither owned these lands nor owned an interest in these lands). The lands at issue in *Lummi Indian Nation* and *Tuscarora Indian Nation* were similar to the Holden Lot in that tribes purchased these lands in fee simple. *See Lummi Indian Tribe*, 5 F.3d at 1357; *Tuscarora Indian Nation*, 362 U.S. at 105-06.

Holden Lot. *See also* 25 U.S.C. § 1724(d)(3).[19] Imposing such a responsibility pursuant to § 81 would defy not only common sense but logic as well.[20] *See Lummi Indian Tribe* v. *Whatcom County*, 5 F.3d 1355, 1359 (9th Cir. 1993) (ruling that Nonintercourse Act did not apply to land Indian tribe purchased in fee simple over which Congress previously terminated its trust obligation); *cf. Federal Power Comm'n* v. *Tuscarora Indian Nation*, 362 U.S. 99, 110-15 (1960) (finding that federal government did not own an interest in lands Indian tribe purchased in fee simple).

Applying § 81 to the Holden Lot also would necessitate that almost every agreement for services executed with an Indian tribe, no matter how minute, would require Secretarial approval. *See In re United States ex rel. Hall*, 825 F.Supp. 1422, 1434 (D. Minn. 1993) (discussing undesirable implications of such an interpretation), *aff'd*, 27 F.3d 572 (8th Cir.

---

[19] Key Bank urges us to rule that the Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721-1735, implicitly repealed § 81 with respect to PIN generally. Although § 1724 provides that several statutes, including 25 U.S.C. § 177, no longer apply to PIN, it makes no mention of § 81. If Congress desired to repeal completely § 81 with respect to all PIN real property it could easily have done so, as it did with § 177. *Cf. Bailey* v. *United States*, 116 S.Ct. 501, 507 (1995) (specifying that if Congress desired to alter a statute it specifically would have done so); *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (quoting *United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir.1972)); *Hirschey* v. *F.E.R.C.*, 760 F.2d 305, 308 (D.C. Cir. 1985) (indicating that Congress understands how to effect such results); *see also Altheimer*, 983 F.2d at 805 (explaining that Congress has neither explicitly nor implicitly overruled § 81). We thus do not find that the Maine Indian Claims Settlement Act implicitly repealed § 81 with respect to all PIN land.

[20] The fact that Congress explicitly determined that the Nonintercourse Act does not apply to PIN further distinguishes this case from the cases in which courts have interposed a trust obligation in regard to real property that Indian tribes have purchased in fee simple. *See Alonzo*, 249 F.2d at 196; *7,405.3 Acres of Land*, 97 F.2d at 422-23. Congress never stated that the Nonintercourse Act did not apply to the real property at issue in *Alonzo* or *7,405.3 Acres of Land*.

1994); *cert. denied*, 115 S.Ct. 1112 (1995); *see also* Raymond Cross, *De-Federalizing American Indian Commerce: Toward a New Political Economy for Indian Country*, 16 Harv. J. L. & Pub. Pol'y 445, 489 (1993) (indicating that even as presently interpreted, "[e]xperience has shown . . . that in many cases . . . [§ 81] harms, rather than helps, Indian tribes. Its rigid formalism and over-inclusiveness chill business dealings between tribes and third parties without providing substantial offsetting benefits."). We believe that further extending administrative authority over the Holden Lot would neither favor, *see Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 766 (1985), nor protect, *see In re Sanborn*, 148 U.S. at 227, Indian tribes. In fact, adopting PIN's interpretation would frustrate Indian tribes' efforts to promote economic development and fiscal autonomy.

This analysis reflects the modern trend in federal Indian policy away from outmoded paternalistic[21] practices and policies. *See Cohen's Handbook* at 180-206; *Federal Indian Law* at 151-59. Particularly during the last forty years, Congress has endeavored to afford Indian tribes the latitude to pursue their social, political, and economic goals as they determine appropriate. *See, e.g.*, 25 U.S.C. § 450 (proclaiming that "prolonged Federal domination . . . has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self government"); 25 U.S.C. § 450a (declaring Congress' commitment to "the establishment of a meaningful Indian self-determination policy"); *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 793 (1991) (Blackmun, J., dissenting) (noting that Congress has passed legislation in recent decades

[21] One proponent of § 81 described the statute as follows: "If it is enacted and becomes part of the law it will be the best shield, the best protection, and the best security for the rights and the helplessness of these sons of the forest that has ever been devised by American legislation or American humanity." Cong. Globe 41st Cong., 3d Sess. 1483, 1484 (daily ed. Feb. 22, 1871) (comments of Senator Davis).

"as part of a larger national policy of 'self-determination' for the Native American peoples"). To find § 81 applicable to a tract of real property that PIN purchased in fee simple to promote its business interests would contravene modern efforts to secure tribal self-determination.

In light of these policy considerations, the dictates of common sense, the vast majority of § 81 jurisprudence, and the Secretary's interpretation, we conclude that the second Settlement Agreement does not qualify as "relative to [Indian] lands." This Agreement did not pertain to Indian trust lands. In fact, the second Settlement Agreement involved lands PIN purchased in fee simple to promote its investment objectives over which Congress expressly disavowed trust responsibility. To rule that this Agreement necessitated the Secretary's approval pursuant to § 81, we conclude, would strain the statute's ordinary meaning and exceed its drafters' intentions.

We recognize that statutes affecting Indian tribes must be construed liberally in favor of the tribes. *See Blackfeet Tribe*, 471 U.S. at 766. The rule recited in *Blackfeet Tribe*, however, does not require a court to ignore compelling authority supporting a conclusion contrary to the position that a particular Indian tribe advances. *See Lyng* v. *Northwest Indian Protective Ass'n*, 485 U.S. 439, 456 (1988). We therefore hold that the Settlement Agreements did not fall within the parameters of § 81, and thus that the two Settlement Agreements constituted valid, binding releases that preclude PIN from further pursuing its remaining claims.

2. *Underlying Agreements*

Despite the fact that § 81 does not apply to the Settlement Agreements, and thus that the Settlement Agreements function to release PIN's remaining claims, we must briefly consider whether § 81 applies to the underlying agreements at issue in this case. We pursue this inquiry to deter potential abuse stemming from the execution of a settlement agreement in the context of § 81. We are particularly concerned that parties to an agreement for services relative to Indian trust lands

may seek to avoid securing Secretarial approval of such agreement pursuant to § 81 by executing a release of all claims arising out of such transaction. Theoretically, one party could then assert that this release did not constitute an agreement with an Indian tribe for services relative to Indian lands, and that the release functions to prohibit any action that a party to the release initiates subsequently to void the underlying agreement pursuant to § 81.[22] To avoid creating a potential safe harbor, we evaluate the three underlying agreements at issue in this case to determine whether or not they necessitated the Secretary's approval pursuant to § 81.

a. *Asset Purchase Agreement*

The Asset Purchase Agreement[23] constituted the operative agreement relating to the Partnership's purchase of SHC. This Agreement was a pure sales contract. Without regard to whether § 81's "services" component pertains to sales contracts, *see Menominee Tribe*, 233 U.S. at 570-71 (finding § 81 applicable to contract for sale of logging equipment and supplies); *but see Hall*, 825 F.Supp. at 1431-32 (ruling that "Congress did not intend that section 81 govern sales contracts"), the only real property that the Agreement mentioned was real property that the seller, SHC, possessed, not land

[22] Even if such a release did preclude a party's action to invalidate the underlying agreement pursuant to § 81, as in the instant case, § 81's *qui tam* provision would permit another party to bring suit in the name of the United States to invalidate the underlying agreements if these underlying agreements did not bear the Secretary's approval. *See Tribal Development*, 49 F.3d at 1212; *United States ex rel. Yankton Sioux Tribe* v. *Gamblers Supply, Inc.*, 925 F.Supp. 658, 668-69 (D.S.D. 1996).

[23] PIN refers both to the Asset Purchase Agreement and to "associated contracts and documentation" as being void *ab initio* pursuant to § 81. The Partnership executed a Non-Competition and Consulting Agreement with John Schiavi on December 30, 1996. Although this Agreement did provide for services, in the form of consulting duties, it never mentioned and did not relate to any Indian lands. The non-competition agreements that the Partnership executed with CWC similarly did not pertain to any Indian lands. Section 81, therefore, does not apply to these "associated contracts and documentation."

that an Indian tribe, specifically PIN, owned. This Agreement simply stipulated that the Partnership secured a $3.5 million guaranteed loan from Key Bank; it neither required nor referred to PIN's use of its land as collateral for this loan.

b. *Partnership Agreement*

We find that the Partnership Agreement did constitute a services agreement because it contained a provision dictating that Palmer enjoyed sole responsibility for managing SHC to the benefit of both Palmer and PIN. *See Koberstein*, 762 F.2d at 619 (finding that § 81 governs management contracts). Nonetheless, despite PIN's assertion that the parties envisioned the use of PIN's lands to advance SHC's business activities, the Partnership Agreement neither specifically mentioned nor indirectly referenced any use of land. It merely stated that PIN would provide a $1 million Letter of Credit to secure Key Bank's Guaranteed Loan financing the purchase of SHC. The Partnership Agreement, therefore, does not fall within the parameters of § 81 because it does not constitute an agreement for services relative to Indian lands.[24] Because the service that the Partnership Agreement provided for entailed the management of SHC, we briefly evaluate this Agreement in light of *Altheimer*, which addressed the applicability of § 81 to a management agreement. *See* 983 F.2d at 811. The relevant *Altheimer* factors indicate that the Partnership Agreement does not fall within § 81's purview. Specifically, the Partnership Agreement did not relate to the management of a facility to be located on Indian lands, and, even if it did, the operation of such facility would not have depended in any way on PIN's legal status as a separate sovereign. *See id.*

[24] As previously noted, the parties to the Partnership Agreement submitted this Agreement for the Secretary's approval pursuant to § 81. The Secretary specifically determined that § 81 did not pertain to the Agreement.

c. *Lease-Option Agreement*

The Lease-Option Agreement, unlike the Partnership Agreement, did not pertain to "services" relative to Indian lands.[25] The Lease-Option simply provided that Schiavi Homes enjoyed the right to use and improve the Holden Lot for the purpose of conducting its business. It also afforded Schiavi Homes an option to purchase the Holden Lot. The Lease-Option never mentioned and did not relate to the provision of services. In addition, although it did involve real property that PIN owned (the Holden Lot), as previously noted this land was not within the parameters of § 81 because it was not trust land. Even if the Holden Lot did constitute Indian trust lands, § 81 would not apply to the Lease-Option Agreement because the Maine Indian Claims Settlement Act provided that 25 U.S.C. §§ 396 & 415 would govern leases involving PIN territory. *See* 25 U.S.C. § 1724(g)(3)(A)&(B) (providing that 25 U.S.C. §§ 396a-396g & 415-415d govern leasing of PIN Territory); *see also Koberstein*, 762 F.2d at 619 (indicating that § 81 governs transactions relative to Indian lands for which Congress has not passed a specific statute).

B. *Breach of Contract*

Palmer and Palmer Management assert that by filing the instant suit, PIN breached the contractual obligation memorialized in the Settlement Agreements to "release all claims." In their counterclaim, these two cross-Appellants sought damages from this purported breach deriving from the "loss of time that could otherwise be spent in the pursuit of legitimate business interests." On appeal, Palmer and Palmer Man-

[25] The Assignment of Lease executed on December 1, 1988, transferring Schiavi Homes' entire interest in the Lease, and particularly the option to purchase the Holden Lot, to Key Bank as additional collateral for the repayment of its Guaranteed Loan in the amount of $3,500,000 did not require Secretarial approval under § 81. This agreement did not entail any services and pertained only to the Holden Lot not to PIN's trust lands. On July 20, 1989, moreover, PIN secured Bureau of Indian Affairs approval for this Assignment pursuant to Title IV of the Indian Financing Act of 1974, 25 U.S.C. §§ 1521-1524.

agement request damages "caused by the lawsuit outside of attorney fees."[26] Because we find the Settlement Agreements to constitute valid releases not within the parameters of § 81, we now consider Palmer and Palmer Management's breach of contract counterclaims.

Both Settlement Agreements state: "The parties hereto have been collectively negotiating a final settlement in the Schiavi Homes loan transaction, termination of business and liquidation, and are desirous of reaching a final settlement between the parties to avoid litigation now in existence or that could hereafter arise." As mentioned earlier, both Settlement Agreements expressly provided that the parties "release, remise and forever discharge each other . . . from all suits . . . at law or in equity . . . which directly or indirectly relate[] to . . . any . . . transactions . . . among each other." The district court dismissed Palmer and Palmer Management's claim for lost business damages on the grounds that PIN's lawsuit in violation of the Settlement Agreements "was seemingly in good faith" and "was not frivolous." *Penobscot Indian Nation* v. *Key Bank*, Civ. No. 94-0212-B, at 6 (D. Me. Dec.13, 1995).

"A compromise agreement, fairly arrived at, is an enforceable contract both under Maine law and general doctrine."[27] *Warner* v. *Rossignol*, 513 F.2d 678, 682 (1st Cir. 1975); *see also Phillips* v. *Fuller*, 541 A.2d 629, 629 n.1 (Me. 1988) (recognizing that claim can be asserted for a breach of a

---

[26] The district court devoted the majority of its analysis to the issue of whether a party may recover attorney's fees for the breach of a settlement agreement's release of claims. The district court found that a party could not recover such attorney's fees in the defense of a suit that itself constituted a breach of a settlement agreement. *See Penobscot Indian Nation* v. *Key Bank*, Civ. No. 94-0212-B, at 6 (D. Me. Dec. 13, 1995). Neither Palmer nor Palmer Management raises this issue on appeal.

[27] Despite the fact that this case raises a federal question, and thus that the district court exercised jurisdiction pursuant to 28 U.S.C. § 1331 not 28 U.S.C. § 1332, we apply Maine law to the remaining claims because they all involve state law and raise substantive rather than procedural issues of law. *See Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938); *Walton* v. *City of Southfield*, 995 F.2d 1331, 1343 (6th Cir. 1993) (applying state law in federal question case involving pendent state claims).

settlement agreement, and, specifically, that such a claim can take the form of a counterclaim); *A. L. Brown Constr. Co., Inc.* v. *McGuire*, 495 A.2d 794, 798 (Me. 1985) (finding settlement agreement to be an enforceable contract). Whether or not an enforceable contract is breached does not turn on whether or not the breaching party acted in good faith. *Cf.* John D. Calamari & Joseph M. Perillo, *The Law of Contracts* 455 (2d ed. 1977) ("Any failure to perform a contractual duty which has become absolute constitutes a breach."); E. Allan Farnsworth, *Contracts* 636 (1982) ("[T]o abandon the traditional view and take account of good faith in all cases would probably be unworkable.").

The issue which demands our full attention, therefore, concerns the nature of the damages that Palmer and Palmer Management may receive as a result of PIN's breach of the Settlement Agreements. Palmer and Palmer Management contend that *Dodge* v. *United States Auto. Ass'n*, 417 A.2d 969, 975 (Me. 1980) supports their claim for damages other than attorney's fees. In *Dodge*, the parties entered into a settlement agreement concerning a homeowners insurance policy. The agreement included a provision releasing all claims stemming from the insurance policy. Subsequent to the execution of the agreement, plaintiff filed suit against the insurance company. The insurance company then responded with "a counterclaim for specific performance of the settlement agreement and for damages resulting from [plaintiff's] . . . breach thereof," *id.* at 972, which "consisted principally of its attorney's fees incurred in defending the suit brought by [the plaintiff] . . . in violation of the settlement agreement," *id.* at 975. The Superior Court did not order specific performance because it found that "effectively the same result had already been accomplished by the court's disposition of the main claims asserted by [the plaintiff]." *Id.* at 975. The Superior Court also denied the insurance company's claim for attorney's fees. *See id.*

The insurance company cross-appealed these rulings, recognizing that if the Maine Supreme Court affirmed the Superior

Court's judgment, there would be no need to reach the issue of specific performance. The *Dodge* court held:

> Because of the pervasiveness and vigor of the American rule making each party bear its own attorney's fees, parties to a settlement — in a contractual provision to the contrary — must be taken to intend to exclude attorney's fees from the damages that otherwise would be recoverable as a foreseeable and probable consequence of a breach of the agreement.

Id. The Maine Supreme Court explained in detail its denial of damages which normally attend a breach of contract in the case of the breach of a settlement agreement:

> An after-the-fact rationalization for the rule denying normal contract damages for breach of settlement agreements can also be developed from the strong public policy favoring such settlements. Were the rule otherwise, a lawyer would be much more wary of informal settlement discussions for fear of subjecting his client to the added expense of the opposing party's attorney's fees if it were later determined that those discussions had in fact reached the point of a binding bilateral agreement. On balance it may be preferable to encourage free settlement negotiations, undampened by the risk of the heavy damages that would be assessed in those relatively few cases where one party fails to perform its agreement.

Id. at 976. The *Dodge* court thus denied the insurance company's cross-appeal in full.

Although it may be debatable whether *Dodge* resolved the issue concerning the possibility of a non-breaching party recovering on a breach of contract theory the costs of litigation, other than attorney's fees, resulting from its defense of a suit filed in contravention of a settlement agreement, we need not take up this debate today. Palmer and Palmer Management have not directed us to any Maine case that grants damages of the variety that they seek, and we have not

found any such case on our own initiative. We note that Maine does recognize the remedy of specific performance in the event of a breach of a settlement agreement. *See McGuire*, 495 A.2d at 798 (indicating that party may seek specific performance as remedy for breach of settlement agreement). By ruling that § 81 does not apply to the Settlement Agreements in this case, and thus that these Agreements preclude PIN's remaining claims, we effectively have provided Palmer and Palmer Management the equitable remedy of specific performance of the Settlement Agreements.

We need not sift alternative sources of authority to resolve the exact issue of whether or not the law affords damages in addition to specific performance in the event of a breach of a settlement agreement[28] because no material issue of fact exists as to the damages that Palmer and Palmer Management sustained as a result of PIN's breach of the Settlement Agreements in this case. *See* Fed. R. Civ. P. 56(e); *Anderson* v.

[28] We recognize that certain jurisdictions may permit a party to sue for both specific performance and consequential damages in the case of the breach of a settlement agreement. *See, e.g., Berryhill* v. *Hatt*, 428 N.W.2d 647, 658 (Iowa 1988); *see also* Restatement (Second) of Contracts § 281(3) (1981). Other jurisdictions, however, apparently require a party to select between specific performance and monetary damages in the event of a breach of a settlement agreement. *See, e.g., TNT Marketing, Inc.* v. *Agresti*, 796 F.2d 276, 278 (9th Cir. 1986). Even those jurisdictions that appear to afford an aggrieved party the right to sue both for specific performance and for consequential damages are not consistent in their approach. In *Village of Kaktovik* v. *Watt*, 689 F.2d 222 (D.C. Cir. 1982), for instance, the District of Columbia Circuit first stated: "Upon breach [of a settlement agreement] by one party, the other party may obtain damages or specific performance as appropriate." *Id.* at 230; *see also Jackson* v. *Washington Monthly Co.*, 569 F.2d 119, 120 n.1 (D.C. Cir. 1977). The *Watt* court then declared: "Upon anticipatory breach of a settlement contract . . . the nonbreaching party m[ay] choose . . . to enforce the agreement and perhaps also recover damages resulting from its breach. . . ." *Id.* at 231. We therefore believe that further exposition of this issue, *see Blinzler* v. *Marriott Int'l, Inc.*, 81 F.3d 1148, 1151 (1st Cir. 1996) (explaining that when a state's highest court has not propounded on an issue in question, "we seek guidance in analogous state court decisions, persuasive adjudications by courts of sister states, learned treatises, and public policy considerations identified in state decisional law"), would be of little benefit in this case.

Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party."); *Celotex* v. *Catrett*, 477 U.S. 317, 323 (1986) ("The moving party is 'entitled to a judgement as a matter of law' [if] . . . the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof."); *Cortes-Irizarry* v. *Corporacion Insular de Seguros*, No. 96-1894 slip op. at 7 (1st Cir. April 16, 1997) ("To defeat a motion for summary judgment, the nonmoving party must demonstrate the existence of a trialworthy issue as to some material fact."). Palmer and Palmer Management have failed to submit any evidence of damages resulting either from "loss of time that could otherwise be spent in the pursuit of legitimate business interests," or, more generally, from "the lawsuit outside of attorney fees." We thus affirm the district court's grant of summary judgment for PIN on Palmer and Palmer Management's counterclaims for breach of the settlement agreement.

C. *Defamation*

Key Bank asserts that the district court erred in granting summary judgment for Marcello on Key Bank's defamation counterclaim. The district court ruled that the press release Marcello prepared and distributed to the media concerning the two press conferences in September 1994 did not defame Key Bank.[29] *See Penobscot*, 906 F.Supp. at 22-23. Relying on

[29] As it did below, Key Bank argues that the following statements, contained in the press release that Marcello drafted and disseminated, are defamatory: (1) the statement claiming that "money . . . had been stolen from" PIN; (2) the statement asserting that Key Bank "conspired and acted to defraud the Penobscot Nation;" (3) the statement explaining that "the conduct of Key Bank . . . resulted in the Penobscot Nation entering into an improvident and unconscionable partnership investment" pursuant to which it "relinquished its right, its land, and its money to those who plundered the Penobscot Nation, lied to the Penobscot Nation and its members, and stole from the Penobscot Nation and its members;" (4) the statement positing that "bad acts, fraud, and bad faith committed by Key Bank . . . against the Penobscot Nation is a far greater conspiracy than could have

Maine law governing a defamation claim initiated by a private person, the district court determined that Marcello was not negligent in drafting and circulating the press release to the media because he reasonably relied "on the veracity of PIN's complaint." *Id.* Finding that Marcello's conduct did not amount even to the negligence applicable to private persons, the district court did not consider whether or not Key Bank constituted a public figure. *See id.*

Key Bank insists that a genuine issue of material fact existed concerning whether or not Marcello was negligent. Key Bank also argues that the district court improperly granted summary judgment *sua sponte* on its defamation claims against PIN, Phillips, and Pardilla. The other cross-Appellants (Schiavi, Palmer, Palmer Development, and Palmer Management) echo Key Bank's objection to the district court's *sua sponte* ruling on their defamation claims against PIN. They maintain that this ruling constituted reversible error.

1. *Marcello*

We first consider whether the district court properly granted summary judgment for Marcello on Key Bank's defamation claim. In order to state a claim for defamation in Maine, a private person must establish the following: "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Powers*, 596 A.2d at 69. The issue in this case is whether Marcello's conduct constituted negligence.

We find that the existence of material issues of fact precludes the entry of summary judgment concerning this issue. *See Lipsett* v. *University of P. R.*, 864 F.2d 881, 885 (1st Cir. 1988) ("If, after ... canvassing ... the material

been outlined" in the press conference; and (5) the statement insisting that PIN "suffered grave financial losses and later learned that they have been victimized, manipulated, lied to, and used by Key Bank."

presented, the district court finds that *some* genuine factual issue remains in the case, whose resolution one way or another *could* affect its outcome, the court must deny the motion."). We believe that reasonable jurors could find negligence in this case. *See Liberty Lobby*, 477 U.S. at 248 (indicating that a material issue of fact exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party"); *see also Mejias-Quiros* v. *Maxxam Property Corp.*, 108 F.3d 425, 427 (1st Cir.1997) ("Negligence . . . is usually a jury issue, but only if there exists evidence from which a rational jury could find negligence in the case at hand."); *Taylor* v. *Gallagher*, 737 F.2d 134, 137 (1st Cir. 1984) ("Summary judgment is inappropriate in[cases involving] negligence . . . if genuine issues of material fact exist or if reasonable jurors could draw different inferences from agreed facts.").

Reasonable jurors could draw a conclusion, at odds with the district court's finding, that Marcello did much more than "read the substance of PIN's complaint to the print and broadcast media at PIN's press conference." *Penobscot*, 906 F.Supp. at 23. Marcello's press release did not simply recite the complaint; it used such language as "lied to," "cheated," "manipulated," "stole[] from," and "conspired and acted to defraud" to describe Key Bank's conduct. Given the negligence standard in Maine of a reasonably prudent person acting under like circumstances, *see Lambert* v. *Tripp*, 560 A.2d 1097, 1100 (Me. 1989); *Wing* v. *Morse*, 300 A.2d 491, 499 (Me. 1973); Restatement (Second) of Torts § 283 (1978), we believe that reasonable jurors could find that Marcello's characterization of Key Bank's conduct amounted not simply to "colorful adjectives and common parlance," *Penobscot*, 906 F.Supp. at 23, but to negligence. *See Marston* v. *Newavom*, 629 A.2d 587, 592 (Me. 1993) ("[D]efamatory language must be 'construed in the light of what might reasonably have been understood therefrom by the persons who [heard] it. In interpreting the language, it is . . . a question of . . . the understanding of those to whom the words are addressed and of the natural and probable effect of the words on them.") (quoting *Picard*

v. *Brennan*, 307 A.2d 833, 835 (Me. 1973)).

Regardless of the reasonableness of the statements that Marcello disseminated to the media at the press conferences, a material issue of fact remains as to whether Marcello actually "rel[ied] on the veracity of PIN's complaint." *Penobscot*, 906 F.Supp. at 23. In his deposition testimony, Marcello stated repeatedly that he could not recollect the exact documents that he used to assemble his press package. At his deposition, in fact, Marcello could not locate the written notes or statements that he made in preparation for the press conferences. There is a material issue as to whether Marcello even consulted PIN's complaint in advance of the press conferences.

In any event, Marcello has not made a sufficient showing that he was privileged to disseminate the defamatory statements to the media. Maine law provides that "allegations made in pleadings are absolutely privileged." *Dineen* v. *Daughan*, 381 A.2d 663, 664 (Me. 1978); *see also Creamer* v. *Danks*, 700 F.Supp. 1169, 1171 (D. Me.) (discussing Maine judicial proceedings pleadings privilege, *aff'd*, 863 F.2d 1037 (1st Cir. 1988). The Maine Supreme Court has indicated that the privilege may be "lost by unnecessary or unreasonable publication beyond the scope of the privileged circumstances." *Vahlsing Christina Corp.* v. *Stanley*, 487 A.2d 264, 267 (Me. 1985); *see also Sriberg* v. *Raymond*, 544 F.2d 15, 16-17 (1st Cir. 1976) ("[I]f an occasion is privileged as to communications between certain parties, the privilege is lost if the communication is made in such a manner as to unnecessarily and unreasonably publish it to others, as to whom the occasion is not privileged.") (quoting *Galvin* v. *New York*, 168 N.E.2d 262, 266 (N.Y. 1960)). The *Vahlsing Christina* court reversed the dismissal of a defamation claim predicated on the dissemination of false statements originally contained in a complaint on the basis that publication removed the statements from the privileged context. *See id.*

In this case, a media relations consultant engaged by a party to a lawsuit claims protection under the judicial proceedings privilege for statements that he disseminated to the press con-

cerning the suit. Marcello published these statements on the same day that PIN filed the complaint but prior to the commencement of any courtroom activity. "The judicial proceedings privilege reflects public policy regarding the importance and necessity of the free flow of information during such proceedings." *Creamer*, 700 F.Supp. at 1171. In light of the circumstances of the press conference and the public policy underlying the judicial proceedings privilege, we doubt very much that this privilege applies to Marcello's publications, which were neither reasonable nor necessary for the efficient disposition of the legal proceedings at issue. *See Frazier* v. *Bailey*, 957 F.2d 921, 932 (1st Cir. 1992) (explaining that under Massachusetts law, if a communication is "unnecessarily or unreasonably published," it is no longer privileged); *Dineen*, 381 A.2d at 665 ("The purpose of the privilege is to allow the attorney to litigate strenuously the interests of his client. To fulfill this purpose the privilege need only be broad enough to encompass statements relevant to those interests. To extend the protection beyond this point would be to abuse the public policy which acts as the underpinnings of the privilege.").

The Maine Supreme Court has explained, moreover, that this privilege applies to judges, parties, witnesses, and attorneys. *See id.*; *Dineen*, 381 A.2d at 664-65. Marcello directs us to no authority indicating that the judicial proceedings privilege pertains to a media consultant who is not a party or a witness or an attorney in the dispute at issue.[30]

We thus conclude that Marcello's statements were not within the judicial proceedings privilege. Based on this con-

[30] Marcello contends that his statements are privileged because they fairly and accurately report a judicial proceeding. The privilege that Marcello attempts to adopt at this point pertains to defamatory statements contained in reports of judicial proceedings prepared by reporters. *See Brown* v. *Hearst Corp.*, 54 F.3d 21, 25 (1st Cir. 1995); *Jones* v. *Taibbi*, 512 N.E.2d 260, 266 (Mass. 1987). Regardless of the fairness or accuracy of Marcello's publications, he is not a reporter. In any event, Maine does not appear to have adopted the "reporter privilege" to this date, and we will not speculate as to the future development of Maine law.

clusion, in addition to our findings that reasonable jurors could determine that Marcello did more than read from PIN's complaint and that a material issue of fact exists as to whether Marcello actually relied on PIN's complaint in formulating these statements, we believe that the district court improperly granted summary judgment for Marcello.

We note that if the trial court, with the assistance of further factual development, determines that Key Bank constitutes a public figure, it may resolve the defamation issue on alternative grounds. According to the Supreme Court,

> it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.

Gertz v. *Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). Although ostensibly a question of law suitable for our resolution, *see Quantum Elecs. Corp.* v. *Consumers Union of United States, Inc.*, 881 F.Supp. 753, 763 (D.R.I. 1995); *Haworth* v. *Feigon*, 623 A.2d 150, 158 (Me. 1991); Restatement (Second) of Torts § 580A cmt. c (1978), a finding of public figure status necessitates a detailed fact-sensitive determination, *see Bruno & Stillman, Inc.* v. *Globe Newspaper Co.*, 633 F.2d 583, 589 (1st Cir. 1980); *Quantum*, 881 F.Supp. at 763; Lawrence H. Tribe, *American Constitutional Law* § 12-13 at 880-81 (2d ed. 1988) (explaining that the determination of whether an individual constitutes a limited public figure necessitates that the trial court establish first the existence of a "public controversy," and second "that the nature and extent of the person's participation in the contro-

versy reached some critical mass at which 'voluntary injection' occurred"). On the record before us now, we cannot make this particularized factual determination.[31]

If the trial court determines that Key Bank constitutes a public figure, Marcello may claim a conditional privilege regarding his publications concerning Key Bank. Such a privilege exists for statements concerning public figures. *See Curtis Publ'g Co.* v. *Butts*, 388 U.S. 130, 155 (1967). Liability does not attach for a defamatory statement concerning a public figure unless the publisher of the statement acted with knowledge or reckless disregard of the falsity of the defamatory publication. *See New York Times* v. *Sullivan*, 376 U.S. 254, 279-80 (1964); *Curtis Publ'g*, 388 U.S. at 155; *Time, Inc.* v. *Firestone*, 424 U.S. 448, 455 (1976); *Michaud* v. *Inhabitants of Livermore Falls*, 381 A.2d 1110, 1113 (Me. 1978). On the record before us, we do not presume to direct a trial court finding regarding either the predicates for or, in the event that the trial court establishes the existence of such predicates, the consequences of a conditional privilege.

2. *PIN, Phillips, and Pardilla*

We now turn to the issue of whether the district court properly granted summary judgment *sua sponte* for PIN, Phillips, and Pardilla. "It is [clear] that district courts have the power to grant summary judgment sua sponte." *Berkovitz* v. *Home Box Office, Inc.*, 89 F.3d 24, 29 (1st Cir. 1996). Two conditions, however, circumscribe the district court's exercise of this power: first, discovery must be "sufficiently advanced that the parties have enjoyed a reasonable opportunity to glean the material facts;" second, the district court must "give[] the targeted party appropriate notice and a chance to

[31] Marcello must establish sufficient evidence to support a factual conclusion that Key Bank is a public figure. *See* Restatement (Second) of Torts § 580A cmt. e (1977) ("For a privilege created by the law to apply, the person who seeks to dispel the seemingly tortious character of his conduct normally has the burden of raising the issue of the privilege and proving the existence of its elements.").

present its evidence on the essential elements of the claim or defense." *Id.*; *see also Stella* v. *Tewksbury*, 4 F.3d 53, 55 (1st Cir. 1993); *Jardines Bacata, Ltd.* v. *Diaz-Marquez*, 878 F.2d 1555, 1560 (1st Cir. 1989).

In this case, discovery had proceeded to the point that the parties understood the material facts. PIN filed its complaint and conducted the press conferences in September 1994. The district court did not make its *sua sponte* ruling until October 1995. By this time, the parties had compiled a voluminous record that included depositions of all of the parties involved in the press conference.

As in *Berkovitz*, however, the district court never "gave the [cross-Appellants] a meaningful opportunity to cull the best evidence supporting [their] position[s], and to present that evidence, together with developed legal argumentation, in opposition to the entry of summary judgment" with respect to PIN, Phillips, and Pardilla. *Id.* at 31. On the contrary, the district courts *sua sponte* ruling took these parties by surprise; only Marcello had moved for summary judgment and neither Schiavi nor the Palmer Defendants filed defamation claims against Marcello.[32]

---

[32] Although Key Bank did have the opportunity to present its position with respect to Marcello, it did not in the case of PIN, Phillips, and Pardilla because none of these parties moved for summary judgment. Key Bank's argumentation may have differed little in response to summary judgment motions filed by PIN, Phillips, and Pardilla, given the similarity of the facts and circumstances relating to its claims against these parties. The nature of PIN, Phillips, and Pardilla's relationship to the conduct at issue as well as the defenses that these parties now assert in response to Key Bank's defamation claims, however, support Key Bank's argument that it would have responded differently to these parties had the district court afforded it an opportunity to do so. *See Stella*, 4 F.3d at 56 (noting the special preparation necessary to defend a motion for summary judgment). Significantly, Key Bank did not present evidence, either in its written or in its oral defense to Marcello's summary judgment motion concerning PIN, Phillips, or Pardilla. *See Berkovitz*, 89 F.3d at 31 n.8 (reasoning that plaintiff at issue in *Berkovitz* did not have an opportunity to put forth evidence relating to summary judgment motion). We thus include Key Bank in our disposition of the district court's *sua sponte* defamation rulings.

We acknolwedge that "[t]his court from time to time has refused to permit appellants to take advantage of supposed oversights that had not been called to the district court's attention by way of a [timely] motion to reconsider." *Id.* (citing *United States* v. *Schaefer*, 87 F.3d 562, 570 n.9 (1st Cir. 1996); *Grenier* v. *Cyanamid Plastics, Inc.*, 70 F.3d 667, 678 (1st Cir. 1995); *VanHaaren* v. *State Farm Mut. Auto. Ins. Co.*, 989 F.2d 1, 4-5 (1st Cir. 1993)). Like the appellant in *Berkovitz*, however, the Palmer Defendants timely filed a motion to reconsider. Although Key Bank and Schiavi did not follow suit, the considerations that govern the filing of a motion for reconsideration are very flexible. *See Berkovitz*, 89 F.3d at 31; *United States* v. *Roberts*, 978 F.2d 17, 21-22 (1st Cir.1992). In any event, neither the cases that *Berkovitz* cites nor Rule 56 imposes an obligation on the subject of a *sua sponte* summary judgment ruling to move for reconsideration in order to preserve its claims on appeal. We therefore refrain from penalizing Key Bank and Schiavi for their purported oversight. Because the district court failed to afford the cross-Appellants any opportunity to oppose its grant of summary judgment for PIN, Phillips, and Pardilla, we hold that this ruling cannot stand.

D. *Emotional Distress*

The district court awarded PIN summary judgment on Palmer's claims for both intentional and negligent infliction of emotional distress deriving from the two press conferences held in September 1994. In his Brief, Palmer merely adverts to the issue of whether the district court properly granted summary judgment on these two claims. Specifically, Palmer mentions this issue only in the table of contents and a single heading of his Brief. Other than these floating references, Palmer never makes any argument in his principal brief concerning either intentional or negligent infliction of emotional distress. "It is settled in this circuit that issues adverted to on appeal in a perfunctory manner, unaccompanied by some developed argumentation, are deemed to have been aban-

doned." *Ryan* v. *Royal Ins. Co.*, 916 F.2d 731, 734 (1st Cir. 1990); *see also Williams* v. *Poulos*, 11 F.3d 271, 285 (1st Cir. 1993).

We recognize that, in its Reply Brief, PIN notes in passing the fact that the district court "correctly" ruled against Palmer and awarded summary judgment to PIN on the emotional distress claims that Palmer mentioned in his counterclaim. In his Reply Brief, Palmer articulates a "response" to PIN concerning the emotional distress claims and devotes four pages to the argument that the district court improperly granted PIN summary judgment on these claims. As we have stated previously, "relief from an appellate court, requested for the first time in a reply brief, is ordinarily denied as a matter of course." *Aulson* v. *Blanchard*, 83 F.3d 1, 7 (1st Cir. 1996); *see also Indian Motorcycle Assocs.* v. *Massachusetts Hous. Fin. Agency*, 66 F.3d 1246, 1253 n.12 (1st Cir. 1995). The general rule set forth in *Aulson* and *Indian Motorcycle* applies to this case. We therefore refrain from evaluating the arguments that Palmer raises for the first time in his Reply Brief.

E. *Supplemental Jurisdiction*

The final issue confronting us is whether or not, the district court properly exercised and now retains jurisdiction over the state law claims at issue in this case. 28 U.S.C. § 1367(a) provides: "[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Section 1367(a)'s discussion of supplemental jurisdiction embraces both pendent and, more importantly for our purposes, ancillary jurisdiction. *See Rodriguez* v. *Doral Mortgage Corp.*, 57 F.3d 1168, 1175 n.8 (1st Cir. 1995); *Vera-Lozano* v. *International Broadcasting*, 50 F.3d 67, 70 (1st Cir. 1995).

In this case, the district court exercised original jurisdiction pursuant to 28 U.S.C. §1331 because PIN's primary claim

arose under 25 U.S.C. § 81. The district court correctly exercised jurisdiction to hear the Appellees' counterclaims because state and federal claims form part of the same constitutional case if they "derive from a common nucleus of operative fact" or "are such that ... would ordinarily be expected to [be] tr[ied] ... in one judicial proceeding." *United States Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966); *see also Baker* v. *Gold Seal Liquors*, 417 U.S. 467, 469 n.1 (1974) (finding ancillary jurisdiction when counterclaim arises out of the "same transaction or occurrence" as the underlying claim); *Rodriguez*, 57 F.3d at 1175-76 (quoting *Gibbs*, 383 U.S. at 725). As the Magistrate Judge noted in this case, "the truth or falsity of the statements [made at the press conferences] for purposes of the defamation claim ... turn[s] on the same 'aggregate of operative facts' as the original claim."[33] *Penobscot Indian Nation* v. *Key Bank*, No. 94-0212-B, at 2 (D. Me. Nov. 10, 1994); *see also Painter* v. *Harvey*, 863 F.2d 329, 333 (4th Cir. 1988) (finding counterclaim for defamation fell within the ancillary jurisdiction of the district court); *Pochiro* v. *Prudential Ins. Co.*, 827 F.2d 1246, 1251 (9th Cir. 1987) (finding that if "defamatory statements are sufficiently related to [sic] subject matter of the original action," defamation claim constitutes a compulsory counterclaim).

Although our affirmance of the district court's ruling with respect to § 81 eliminates the sole federal claim conferring original jurisdiction pursuant to 28 U.S.C. § 1331, the district court has discretion to hear the remaining state law claims at issue. "In a federal question case, the termination of the foundational federal claim does not divest the district court

[33] We do not distinguish between the counterclaims of Schiavi, Palmer, Palmer Development, Palmer Management, and Key Bank against PIN and the counterclaims of Key Bank against Marcello, Phillips, and Pardilla, for purposes of our discussion of supplemental jurisdiction. All of the counterclaims satisfy the "basic transaction-or-occurrence test that is used to distinguish between compulsory and permissive counterclaims." 6 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1404, at 32 (2d ed. 1990). Supplemental jurisdiction exists for all of the counterclaims in this case.

of power to exercise supplemental jurisdiction, but, rather, sets the stage for an exercise of the court's informed discretion." *Roche* v. *John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 256-57 (1st Cir. 1996) (citing 28 U.S.C. § 1367(c)(3)). As the *Roche* court pointed out, "the trial court must take into account concerns of comity, judicial economy, convenience, fairness, and the like" in making this decision. *Id.* at 257. This determination necessitates an evaluation of the facts peculiar to each case.[34]

We emphasize that the decision to retain or disclaim jurisdiction over the remaining state law claims at issue in this case lies in the broad discretion of the district court. *See Vera-Lozano*, 50 F.3d at 70; *Martinez* v. *Colon*, 54 F.3d 980, 990 (1st Cir.) (finding that "once the court determined so far in advance of trial that no legitimate federal question existed, the jurisdictional basis for plaintiff's pendent claims under Puerto Rico law evaporated"), *cert. denied*, 116 S.Ct. 515 (1995). 28 U.S.C. § 1367(c) specifically provides that the district court may refuse to exercise supplemental jurisdiction over a state law claim if the claim "raises a novel or complex issue of State law," if the claim "substantially predominates over the claim or claims over which the district court has original jurisdiction," or if "the district court has dismissed all claims over which it has original jurisdiction."

---

[34] Finding that the district court properly considered the state law claims at issue despite the fact that it had disposed of the federal claim supporting original jurisdiction, the *Roche* court emphasized the following: "The litigation had matured well beyond its nascent stages, discovery had closed, the summary judgment record was complete, the federal and state claims were interconnected, and powerful interests in both judicial economy and fairness tugged in favor of retaining jurisdiction." § 81 F.3d at 257.

Conclusion

These appeals present many interesting issues. We find the question of § 81's applicability to the transactions at issue in this case particularly important in light of the evolution of federal Indian law and of the marketplace in which Indian tribes actively participate. Our conclusion that § 81 does not apply either to the Settlement Agreements or to the underlying agreements governing the parties' business relations reflects our determination not simply to dovetail with those authorities that have offered persuasive interpretations of § 81 before us, but further to reach a logical conclusion that promotes the interests of Indian tribes as they grapple with modern economic realities. We believe that in so doing we also give effect to the intentions of those who adopted § 81 in 1872.

We affirm in part, reverse and vacate in part, and remand to the district court for further proceedings consistent with this opinion. Costs to Appellees and cross-Appellants.

United States Court of Appeals
For the First Circuit

No. 96-1670

PENOBSCOT INDIAN NATION,
PLAINTIFF, APPELLEE,
v.
KEY BANK OF MAINE, ET AL.,
DEFENDANTS, APPELLEES,

JOHN PALMER, PALMER MANAGEMENT CORPORATION, AND PALMER DEVELOPMENT CORPORATION,
APPELLANTS.

No. 96-1671

PENOBSCOT INDIAN NATION,
PLAINTIFF, APPELLANT,
v.
KEY BANK OF MAINE, ET AL.,
DEFENDANTS, APPELLEES.

No. 96-1672

PENOBSCOT INDIAN NATION,
PLAINTIFF, APPELLEE,
v.
KEY BANK OF MAINE, ET AL.,
DEFENDANTS, APPELLEES.

JOHN SCHIAVI,
APPELLANT.

No. 96-1736

PENOBSCOT INDIAN NATION,

PLAINTIFF, APPELLEE,

v.

KEY BANK OF MAINE,

DEFENDANT, APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

[HON. MORTON A. BRODY, U.S. District Judge]

Before SELYA and STAHL, *Circuit Judges*, and WOODLOCK,* *District Judge*.

ERRATA SHEET

Please make the following changes to the opinion issued on May 5, 1997:

On page 6, line 9, "May 1988" should read "May 1989"

On page 6, the first full paragraph, lines 9-15, should be moved in its entirety to become the end of the paragraph that begins on line 16 (beginning "In April 1989"). Specifically, it should be placed after the sentence that reads "As part of the liquidation plan, PIN and Palmer then assigned Schiavi Homes' assets to Key Bank." It should not form a new paragraph, but, instead, should form the continuation of the paragraph that currently is at page 6, lines 16-19. In addition, footnote marker 2 (currently located after "Key Bank." on page 6, line 19), should be moved to follow the sentence that reads "In May 1989, Key Bank notified PIN that it intended to exercise the purchase option contained in the Lease-Option Agreement."

On page 17, line 15, replace brackets around [hereinafter "Indian fee lands"] with parentheses.

United States District Court
District of Maine

Civ. No. 94-0212-B

PENOBSCOT INDIAN NATION,
PLAINTIFF,
v.
KEY BANK OF MAINE, ET AL.,
DEFENDANTS.

ORDER AND MEMORANDUM OF DECISION

BRODY, District Judge.

Plaintiff, the Penobscot Indian Nation ("PIN"), filed a ten count complaint against nine Defendants, for claims arising out of a failed business venture.[1] PIN seeks declaratory judgement under 25 U.S.C. § 81, damages under state tort and contract theories, and civil RICO claims. Defendants Key Bank, CWC, Burlington, John Schiavi, John Palmer, Palmer Management, and Palmer Development move for Summary Judgement. Defendant SCH filed a Motion to Dismiss which, under the Court's Order of June 7, 1995, will be treated as

[1] PIN brings this action against: (1) Key Bank of Maine ("Key Bank"), (2) Consumers Water Company ("CWC"), (3) SCH Corporation ("SCH"), (4) Burlington Homes of New England, Inc. ("Burlington"), (5) Bernstein, Shur, Sawyers and Nelson, P.C ("Bernstein"), (6) John Schiavi, (7) John Palmer, (8) Palmer Management Corporation ("Palmer Management"), and (9) Palmer Development Corporation ("Palmer Development"). PIN sues for: (1) declaratory judgement under 25 U.S.C. § 81, (2) breach of duty of good faith and fair dealing (against CWC, SCH, Key Bank, John Schiavi, Burlington, Palmer Management and John Palmer), (3) breach of contract-misrepresentation (against CWC, SCH, John Schiavi, Burlington and John Palmer), (4) fraud (against Bernstein), (5) negligence (against Bernstein), (6) breach of fiduciary duty (John Palmer and Palmer Management), (7) breach of fiduciary duty (against Key Bank), (8) breach of contract (against John Schiavi), and (9) RICO violations (against Key Bank, CWC, Burlington, Bernstein, John Schiavi, John Palmer, Palmer Management, Palmer Development).

a Motion for Summary Judgement. Only Defendant Bernstein has not filed a motion for summary judgement.[2]

Defendants Key Bank, John Schiavi and the Palmer Defendants (John Palmer, Palmer Management and Palmer Development) filed counterclaims against PIN for defamation and punitive damages. John Palmer also claims both negligent and intentional infliction of emotional distress and breach of contract by Palmer and Palmer Management). Key Bank also files counterclaims against Michael Marcello, PIN's media consultant, and individual PIN members Reuben Phillips and Jerry Pardilla. Only Counterclaim Defendant Michael Marcello responded with a motion for summary judgement.

The Court now addresses: (1) Defendants' Motions for Summary Judgement on the original claims, (2) Defendant SCH's Motion for Summary Judgement, and (3) Counterclaim Defendant Marcello's Motion for Summary Judgement.

I. Background

The Court construes the facts in the light most favorable to the nonmoving party. In 1986 PIN, a federally recognized sovereign Indian tribe, formed a limited partnership with Palmer Management for the purpose of buying the Schiavi Homes Corp. ("Schiavi Homes") from CWC. CWC previously acquired Schiavi Homes, a Maine corporation which marketed and sold mobile homes, from John Schiavi in 1983.

PIN invested in Schiavi Homes on the advice of Tribal Assets Management ("TAM"), an investment banking firm which advises both PIN and the Passamaquoddy Indian Tribe. TAM aided in the negotiations of both the Partnership Agreement with Palmer Management, as well as the final Asset Purchase Agreement with CWC. Under the Partnership Agreement, PIN, the limited partner, acquired a 90% interest in Schiavi Homes. Palmer Management, the sole general part-

[2] Bernstein filed a Motion to Discuss, which was denied on June 13, 1995.

ner received only a 10% stake, but gained full control over all management decisions. Key Bank financed the purchase on the condition that John Palmer retain full management control over Schiavi Homes. Palmer, an associate of John Schiavi, managed the company under CWC's ownership. As a prerequisite to financing the deal, Key Bank also required PIN to: (1) post a $1 million letter of credit to secure its loan, and (2) agree to restrictions on the withdrawal of funds. The Secretary of the Interior determined that the Partnership Agreement did not fall within 25 U.S.C. § 81, and therefore did not require approval. PIN now alleges that this agreement was a sham.

The Partnership attained two noncompetition agreements in connection with its purchase of Schiavi Homes. First, CWC assigned to the Partnership its interest in a noncompetitive agreement with John Schiavi. Additionally, John Palmer signed a noncompetitive agreement with the Partnership.

Schiavi Homes, prosperous under John Schiavi and CWC, experienced financial difficulties almost immediately after the sale to the Partnership. Consequently PIN was forced to make several additional investments in the Partnership. Over the course of three years PIN invested both land and money in Schiavi Homes. In October of 1987 PIN signed a Lease Agreement with the Partnership renting the "Holden Lot," PIN property, to the Partnership for the nominal consideration of $1 per year. The Lease Agreement also gave the Partnership the option to purchase the land for $100,000. Later the Partnership pledged the Lease Agreement to Key Bank, who ultimately sought to exercise the option to purchase.[3]

Although PIN continued to finance Schiavi Homes, the business never rebounded. Ultimately in April of 1989, with Schiavi Homes suffering severe financial difficulties, PIN de-

[3] PIN does not refute Defendant Key Bank's assertion that George Big Eagle, on behalf of B.D. Oh, the Area Director of the Eastern Area Office of the Bureau of Indian Affairs Division ("BIA") of the U.S. Department of the Interior, approved the transfer of the Holden Lot to Key Bank.

cided, with the advice of its counsel, Bernstein, to liquidate Schiavi Homes. PIN and Palmer signed over the company's assets to Key Bank.

In addition to its financial problems, Schiavi Homes, under the Partnership, also experienced various legal difficulties. In an effort to resolve these matters PIN signed two Settlement Agreements in September of 1989. One agreement sought to resolve, among other issues: (1) Key Bank's action against PIN for the Holden property, (2) Schiavi Homes' suit against Burlington and Consumers for breach of their covenants not-to-compete, and (3) the foreclosure by Key Bank on the real property of Schiavi Homes.[4] The second agreement was more expansive in nature.[5] Both agreements, however, contain sweeping language and both explicitly sought to "release, remise and forever discharge all claims" among the signing parties. The validity of these Settlement Agreements lies at the heart of the present suit; PIN contests them both.

PIN's present suit arises from an investigation by the Penobscot County Sheriff Carl Andrews into alleged wrongdoings by Key Bank. Based on the improprieties allegedly revealed, PIN now attributes the failure of Schiavi Homes to continued mismanagement and self-dealing on the part of John Palmer, acting in collusion with John Schiavi, Key Bank and others. After reaching these conclusions, PIN held a press conference in September, 1994, to announce the filing of this lawsuit. The statements made at this press conference, stemming from PIN's complaint in this action, form the basis of defendants' counterclaims.

II. Summary Judgement

Summary judgment is appropriate in the absence of a genuine issue of any material fact, when the nonmoving party

---

[4] PIN, SCH, Palmer Management, John Palmer, Schiavi Homes, Key Bank, CWC, and Burlington signed this agreement, dated September 29, 1989.

[5] PIN, John Schiavi, Palmer Management, John Palmer, Schiavi Homes, and Key Bank signed this agreement, dated September 29, 1989.

is entitled to a judgement as a matter of law. Fed. R. Civ. P. 56(c). An issue is genuine, for summary judgement purposes, if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A material fact is one which has "the potential to affect the outcome of the suit under applicable law." *Nereida-Gonzalez* v. *Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993). Facts may be drawn from "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits." Fed. R. Civ. P. 56(c). On summary judgement, the moving party bears the initial burden of demonstrating the absence of a disputed issue of material fact. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-23 (1977). However, the Court views the record in the light most favorable to the nonmoving party. *FDIC* v. *Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994).

III. Defendants' Motion for Summary Judgement

Defendants' Motion for Summary Judgement, as well as Plaintiff's objection, revolves chiefly around 25 U.S.C. § 81, the federal statute governing contracts with Indian tribes. PIN's tort and contract claims will survive only to the extent that this Court construes § 81 to invalidate the contracts at issue, specifically the Settlement Agreements.

The Court holds that the documents at issue fall outside the scope of the statute's language. Consequently, PIN's tort and contract claims fail given the binding force of the Settlement Agreements. The Court therefore grants Defendants' Motion for Summary Judgement as to Count I (declaratory judgement), Count II (breach of duty of good faith and fair dealing), Count III (breach of contract-misrepresentation), Counts VI and VII (breach of fiduciary duty), and Count VIII (breach of contract) as to all defendants. Count IX, PIN's RICO claim, is barred by the statute of limitations.

A. *Federal Indian Statutes*

In Count I, Plaintiff seeks declaratory judgement that 25 U.S.C. § 81 applies to all the contracts at issue. The Court's analysis, however, deals primarily with the Settlement Agreements because, if valid, the relevancy of the remaining documents is immaterial and the remaining claims would be precluded by the binding force of the Settlement Agreements. Plaintiff argues, in short, that the Settlement Agreements, and indeed all of the agreements involved with PIN's purchase and control of Schiavi Homes: (a) fall within § 81, and (b) are therefore invalid because they were never properly approved by the Secretary of the Interior as required by the statute. Defendants, however, contend that the contracts at issue do not fall within the plain language of § 81, and even if they do, the Settlement Agreements are nonetheless valid because the Federal Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721-1735, preempts § 81.

1. *25 U.S.C. § 81*

Congress passed § 81 in 1872 "to protect Indians from improvident and unconscionable contracts." *Altheimer & Gray* v. *Sioux Mfg. Corp.*, 983 F.2d 803, 805 (7th Cir.) (quoting *In re Sanborn*, 148 U.S. 222, 227 (1893)), *cert. denied*, 114 S.Ct. 621 (1993)). The statute requires the Secretary of the Interior to approve all contracts: (1) with an individual Indian or any tribe of Indians, (2) in consideration of services, (3) that are relative to Indian lands. 25 U.S.C. § 81. Failure to secure approval of such contracts renders them null and void — *ab initio. Id.; see, e.g., Inecon Agricorp.* v. *Tribal Farms Inc.*, 656 F.2d 498, 500-501 (9th Cir. 1981) (contract voided because not a contract with individual Indian or Indian tribe). The Supreme Court has consistently held that Indian statutes are to be construed "liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *see County of Yakima* v. *Yakima Indian*

Nation, 112 S.Ct. 683, 693 (1992); *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918).

Despite its harsh remedy and arguably antiquated rationale, § 81 remains in effect today. "Section 81 plainly puts all parties on notice that any contract that relates to tribal lands or funds is null and void without BIA approval." *A. K. Management Co.* v. *San Manuel Band of Mission Indians*, 789 F.2d 785, 788 (9th Cir. 1986). Furthermore, "[u]ntil Congress repeals or amends the Indian ... statutes ... we must give them 'a sweep as broad as their language,' and interpret them in light of the intent of the Congress that enacted them." *Central Mach. Co.* v. *Arizona State Tax Comm'n*, 448 U.S. 160, 166 (1980) (citations omitted). It is against this background that the Court now assesses the validity of the Settlement Agreements.

a. *Settlement Agreements*

Despite Plaintiff's efforts to fit the Settlement Agreements under § 81, the statute is inapplicable. As noted, § 81 applies to contracts: (1) with an individual Indian or an Indian tribe, (2) for services, (3) relative to their Indian lands. 25 U.S.C. § 81. The Settlement Agreements, while effectively contracts with an Indian tribe, are neither contracts for services, nor contracts relative to Indian lands.

i. *Contract with Indian Tribe*

The Settlement Agreements pertain to Schiavi Homes as the signatory, as well as PIN itself, and are therefore contracts with an Indian tribe under 25 U.S.C. § 81. PIN, through its representative, signed both agreements. Defendants argue that the statute covers Indian tribes, and not their various business enterprises and corporate partnerships, and thus the agreements fall outside the purview of the statute. Plaintiff, however, contends that PIN and the Partnership are effectively interchangeable.

Courts look beyond the mere formality of corporate structure in construing the identity of parties with regard to § 81.

See Altheimer & Gray, 983 F.2d at 809. In *Altheimer & Gray* v. *Sioux Mfg. Corp.*, the Seventh Circuit affirmed the District Court's determination that an Indian tribe, and its wholly owned manufacturing company were essentially indistinguishable, and thus a contract with the company was a contract with an Indian tribe under § 81. *Id.* To determine otherwise would in effect allow Indian tribes to evade Congressional intent at will by forming alternative entities, and thereby avoid the requirements of the statute. *See Pueblo of Santa Ana* v. *Hodel*, 663 F.Supp. 1300, 1306 (D.D.C. 1987) (nonprofit instrumentality of Indian tribe came within the statute despite the tribe's efforts to classify it otherwise).

As in *Altheimer & Gray*, the contracts with the Partnership here, are effectively contracts with an Indian tribe. PIN owns a 90% share in Schiavi Homes, and provided the bulk of the financial backing for the Partnership. *See Inecon Agricorp.*, 656 F.2d at 501 (not a contract with Indian tribe because tribe had very limited role under the contract).

ii. *Contract for Services*

Section 81 also requires that the contract at issue be one involving "services," a term which does not encompass the import of the Settlement Agreements. Plaintiff, however, contends that such a narrow reading of the statute undermines Congressional intent.

While courts have construed § 81 liberally, they have not treated the term "services" as a mere catchall. In *U.S. ex rel. Harlan* v. *Bacon*, the Eighth Circuit ruled that a lease for sharecropping on Indian land did not constitute "services" as contemplated by § 81. 21 F.3d 209, 212 (8th Cir. 1994). The court pointed to the variety of statutes which deal with Indian transactions, such as 25 U.S.C. § 177, the federal statute governing the lease of tribal land, to illustrate the Congressional intent to encompass only service contracts under § 81. *Id.* To do otherwise would make either § 81, or the various other statutes superfluous. *Id.* Similarly in *In re U.S. ex rel. Hall*, the district court held that contracts for gambling equip-

ment did not constitute "services" under § 81, and more generally, that the provision did not govern sales contracts. 825 F.Supp. 1422, 1432 (D. Minn. 1993), *aff'd*, 26 F.3d 572 (8th Cir. 1994), *cert. denied*, *Hall* v. *Creative Games Technology, Inc.*, 115 S.Ct. 1112 (1995).

While PIN engaged in a variety of transactions during the course of its involvement with Schiavi Homes, the Settlement Agreements themselves do not constitute contracts for services. The Settlement Agreements rather pertain to the release of legal claims, an exchange, analogous in some regard to a sales contract. Section 81, therefore, does not apply to the Settlement Agreements, and the failure of the parties to gain secretarial approval does not invalidate the agreement.

iii. *Relative to Indian lands*

Although the contract for service prong analysis removes the Settlement Agreements from the purview of the statute, the Court nonetheless notes that the Settlement Agreements are also exempt from § 81 under the relation to Indian lands requirement. Plaintiff argues that the Settlement Agreements deal with the Holden Lot under the Lease Agreement, as well as the pledge of that agreement to Key Bank and therefore implicates Indian lands. The Court, however, analyzes the Settlement Agreements independently of the Lease Agreement, as the validity or invalidity of the latter does not bear on resolution of the former necessarily. *Cf. Narragansett Indian Tribe* v. *Ribo, Inc.*, 686 F.2d 48, 53 (1st Cir. 1988) (documents inextricably tied together and thus analyzed together.)

Altheimer & Gray lends guidance to the "relative to Indian lands" inquiry. *See* 983 F.2d at 811. In *Altheimer & Gray*, the Seventh Circuit enumerated four considerations to aid in the determination as to whether a management contract is relative to Indian lands: "1) Does the contract relate to the management of a facility to be located on Indian lands? 2) If so, does the non-Indian party have the exclusive right to operate that facility? 3) Are the Indians forbidden from

encumbering the property? 4) Does the operation of the facility depend on the legal status of an Indian being a separate sovereign?" *Id.* No single factor is dispositive in this determination. *Id.* And in this case no single factor is met. The Settlement Agreements deal with the disposition of the pending legal claims, not the transfer of Indian lands, nor the management, control, or particular status of those lands.

b. *Partnership Agreement, Asset Purchase Agreement, Lease Agreement, Pledge of Lease Agreement*

Plaintiff also challenges, under § 81, the validity of the original Asset Purchase Agreement, the Partnership Agreement, the Lease Agreement, and the pledge of the Lease Agreement to Key Bank. However, given the Court finds that the Settlement Agreements are valid, it is unnecessary to test the validity of these documents. Any suits arising out of these agreements would necessarily be precluded by the releases contained in the Settlement Agreements.

2. *Federal Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721-1735*

Similarly given the Court's determination that the Settlement Agreements survive § 81, we need not address the effect of 25 U.S.C. §§ 1721-1735, the Federal Maine Indian Claims Settlement Act, on § 81. The Court expresses no opinion as to the merits of Defendants' claim on these grounds.

B. *Tort and Contract Claims*

The Settlement Agreements, a valid release, bar PIN's tort and contract claims, Counts II, III, VI, VII, and VIII. "It is beyond cavil that a suit can be barred by the earlier settlement of another suit in either of two ways: res judicata or release." *Nottingham Partners* v. *Trans-Lux Corporation*, 925 F.2d 29, 32 (1st Cir. 1991). Maine courts both encourage settlements, *Norton* v. *Benjamin*, 220 A.2d 248, 252 (Me. 1966), and recognize the binding force of releases, *Leclair* v. *Wells*,

395 A.2d 452, 453 (Me. 1978) ("a valid release will extinguish a cause of action . . ."). The Supreme Judicial Court of Maine noted: "[w]here the contract is in the nature of a full settlement and a release of all claims for a consideration agreed upon, one may discover on the basis of hindsight the unwisdom of his bargain. But the law deems that society gains most from the certainty and finality of such agreements. . . ." *Norton*, 220 A.2d at 251.

Maine law also recognizes the preclusive effect of settlements. *Butters* v. *Kane*, 347 A.2d 602, 604 (Me. 1975). *Accord Anderson* v. *State*, 518 A.2d 360, 361 (Vt. 1985). Here the language of the Settlement Agreements is clear. The signatories to one of the two agreements, PIN, SCH, Palmer Management, Schiavi Homes, Key Bank, CWC, and Burlington agreed to unequivocally:

> release, remise and forever discharge each other, from all actions, causes of actions, claims and demands whatsoever . . . and from all suits . . . at law or in equity . . . up to and including the day of the date of this release which directly or indirectly relates to the Schiavi Loan Transaction, the Asset Purchase Agreement . . . the liquidation of Schiavi assets and any other transactions, dealings, or agreements (written or oral) among each other with respect thereto. (1989 Settlement Agreement).[6]

Interpretation of unambiguous contractual language is an issue of law, for which the Court is responsible. *Fowler* v. *Boise Cascade Corp.*, 739 F.Supp. 671, 673 (D. Me. 1990), *aff'd*, 948 F.2d 49 (1st Cir. 1991); *People's Heritage Savings Bank* v. *Recoll Management, Inc.*, 814 F.Supp. 159, 162 (D. Me. 1993). Here the language is clear, and the effect is straightforward: the parties have explicitly released one

[6] The second of the two Settlement Agreements contains almost identical language, and was signed by PIN, John Schiavi, Palmer Management, John Palmer, Schiavi Homes and Key Bank.

another from future legal battles on these issues. PIN cannot now escape from the broad reach of this agreement.

Because PIN released its tort and contract claims under the Settlement Agreement, the Court need not consider the alternative theories of res judicata and statute of limitations which might also have precluded these claims.

C. *RICO*

PIN's RICO claims are time-barred. Civil RICO claims carry a four-year statute of limitations as provided by the Clayton Act, 15 U.S.C. § 15. *Agency Holding Corp.* v. *Malley Duff & Assocs.*, 483 U.S. 143 (1987). The statute accrues from the date the Plaintiff discovered, or should have discovered, his or her injury. *Rodriguez* v. *Banco Central Corp.*, 917 F.2d 664, 666 (1st Cir. 1990) (endorsing Second Circuit's decision in *Bankers Trust Co.* v. *Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. denied*, *Soifer* v. *Bankers Trust Co.*, 490 U.S. 1007 (1989)). Injury under RICO relates to injury to the party's "business or property." *Bankers Trust*, 859 F.2d at 1103.

In the case at bar, the injury in question is PIN's business losses from the demise of Schiavi Homes, which transpired over a three-year period from the purchase date in 1986 to its liquidation in 1989. At the very latest, on September 29, 1989, the date PIN signed the Settlement Agreements, PIN knew of Schiavi Homes' losses. Consequently PIN's RICO claims would be actionable only until September, 1993. PIN filed this action on September 14, 1994. This claim is therefore time-barred.

IV. SCH's Motion for Summary Judgement

SCH, a Maine Corporation, and defendant in Counts II (breach of good faith and fair deaing), III (breach of contract-misrepresentation) and IX (RICO), previously filed a motion to Dismiss in this case. In response to this motion, the Court denied Plaintiff's demand to strike SCH's Articles of Dissolution, however, the Court granted Plaintiff's request to have

SCH's Motion to Dismiss treated as a Motion for Summary Judgement.

SCH dissolved on August 8, 1990. It seeks summary judgement on two grounds: (1) improper service and, (2) the statute of limitations relating to dissolved corporations. However because SCH was also a party to one of the 1989 Settlement Agreements, which released the parties from any pending or future suits in relation to the Schiavi Homes transactions, the present claims are barred. The Court need not consider the alternate grounds on which SCH seeks summary judgement.

V. Plaintiff's Motion for Summary Judgement on Counterclaims

Defendants John Schiavi, Key Bank, and the Palmer Defendants (John Palmer, Palmer Development and Palmer Management) filed counterclaims on a variety of state law theories including defamation, punitive damages, and emotional distress against PIN, its media consultant, Michael Marcello, and PIN representatives, Reuben Phillips and Jerry Pardilla. The basis for these claims were statements made at PIN's press conference announcing the filing of PIN's suit. According to Key Bank, PIN, through its representatives claimed:

(1) "That [PIN] is a 'victim' of or had been 'victimized' by Key Bank and others;"

(2) "That 'money . . . had been stolen from [PIN]' by Key Bank and others;"

(3) "That the action was being brought against Key Bank because Key Bank 'conspired and acted to defraud the Penobscot Nation;'"

(4) "That 'the conduct of Key Bank . . . resulted in the Penobscot Nation entering into an improvident and unconscionable partnership investment' under which it 'relinquished its right, its land, and its money to those who plundered the Penobscot

Nation, lied to the Penobscot Nation and its members, and stole from the Penobscot Nation and its members;'"

(5) "That 'the bad acts, fraud, and bad faith committed by Key Bank . . . against the Penobscot Nation is a far greater conspiracy than could have been outlined in the press conference' and";

(6) "That the Penobscot Nation has 'suffered grave financial losses and later learned that they have been victimized manipulated, lied to, and used by Key Bank.'"

(Def. Ans. p. 15).

The Court now considers Defendant Michael Marcello's Motion for Summary Judgement against Key Bank, as to its defamation and punitive damages counterclaims.

A. *Defamation*

A cause of action for common law defamation requires a showing of:

(a) a false and defamatory statement concerning another;

(b) an unprivileged publication to a third party;

(c) fault amounting at least to negligence on the part of the publisher, and;

(d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Lester v. *Powers*, 596 A.2d 65, 69 (Me. 1991) (citing *Restatement (Second) of Torts*, § 558 (1977).

First Amendment principles constrain the parameters of state law defamation claims. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 283-84 (1964). The Supreme Court has adopted a two-tiered approach to defamation, establishing different standards for public and private actors. *Gertz* v. *Robert*

Welch, Inc., 418 U.S. 323, 342-48 (1973). The First Amendment requires proof of "actual malice" to establih defamation against a public official. *New York Times*, 376 U.S. at 280. Actual malice requires knowledge that the statements at issue were false or made with reckless disregard of whether they were false or not. *Id.* States, however, are free to employ more lenient standards for defamation against private figures. *Gertz*, 418 U.S. at 347. Maine has adopted the aforestated negligence standard. *Lester* v. *Powers*, 596 A.2d at 69.

Ordinarily when faced with a defamation claim the Court must analyze the plaintiff's status under prevailing First Amendment principles, and then apply the appropriate standard dictated by that determination. In the case at bar the parties dispute whether Key Bank, in its corporate entity, constitutes a public figure for limited purposes. Here, however, this analysis is unnecessary given the Court's determination that Key Bank fails to allege facts that would establish even the lower negligence standard afforded to private citizens in defamation claims.

At issue here is the requisite mental state, negligence. According to the Restatement: "the standard of conduct to which [the party] must conform to avoid being negligent is that of a reasonble man under like circumstances. *Restatement (Second) of Torts* § 283; *see also* W. Page Keeton, Dan Dobbs, Robert Keeton and David Owen, *Prosser & Keeton on The Law of Torts*, § 32 (1984) (negligence standard defined by the reasonable person, a person of ordinary prudence, a person of reasonable prudence, or some other blend of reason and caution).

The facts here do not support Key Bank's allegations that Marcello acted negligently. Marcello did little more than read the substance of PIN's complaint to the print and broadcast media at PIN's press conference. At most, Marcello used more colorful adjectives and common parlance to describe PIN's legal claims. Nonetheless his assertions were clearly grounded in PIN's complaint. Marcello's use of the terms "lied to," "manipulated," and "cheated" simply describe PIN's legal

causes of action for fraud and breach of contract. Marcello had no reason to suspect the veracity or legitimacy of PIN's allegations which were ultimately filed in court as a public document. Nor has Key Bank brought to the attention of this Court anything which would make such reliance negligent. Key Bank has at no time asserted that PIN's claims were frivolous, yet it aims to hold Marcello, PIN's messenger, responsible for this very offense. Even assuming, as Key Bank asserts, that Marcello harbors some ill will or bias against Key Bank due to his prior employment by Joseph Ricci and Catherine Petit, both of whom were involved in litigation against Key Bank, the Court still maintains that it was reasonable for Marcello to rely on the veracity of PIN's complaint.

While courts have held that summary judgement is generally inappropriate in cases involving negligence, this rule is not absolute. *Dobb* v. *Baker*, 505 F.2d 1041, 1043-44 (1st Cir. 1974) (upholding summary judgement for defendant where "there was nothing to support a finding of negligence"); *see Moore's Federal Practice*, § 56.17; Wright, Miller & Kane, 10A *Federal Practice and Procedure* § 2729 (1983). Even with regard to negligence, summary judgement is proper when the facts in question are undisputed and only one conclusion can reasonably be drawn. *Taylor* v. *Gallagher*, 737 F.2d 134, 137 (1st Cir. 1984). In such a case negligence becomes a matter of law. *Id.*[7]

This case poses one of those unusual situations where summary judgment is appropriate on the issue of negligence, for there is "nothing to be tried." *Bland* v. *Norfolk and Southern R.R. Co.*, 406 F.2d 863, 866 (4th Cir. 1969). Construing the facts in the light most favorable to the nonmoving plaintiff,

[7] Maine law also supports the proposition that in certain circumstances summary judgment is appropriate on the issue of negligence. For example, in *Lorfano* v. *Dura Stone Steps, Inc.*, the Maine Supreme Judicial Court recently granted summary judgment on a strict liability claim, which the court noted was "really nothing more than a ground of negligence liability." 569 A.2d 195, 196 (Me. 1990) (at issue was the reasonableness of the defendant's conduct).

no reasonable juror could conclude that Marcello's action constitutes defamation. *Cf. Cerrito* v. *Time, Inc.*, 449 F.2d 306, 307 (9th Cir. 1971) (affirming summary judgement on grounds that plaintiff did not establish malice in libel claim). Summary judgement is nonetheless proper where: "the plaintiff has the burden of proof on an essential element at trial and it is clear that the defendant would have been entitled to a direct verdict at trial if the plaintiff presented no more evidence than was before the court . . . on . . . summary judgement." *Guiggey* v. *Bombardier*, 615 A.2d 1169, 1171 (Me. 1992) (citing *H.E.P. Development Group, Inc.* v. *Nelson*, 606 A.2d 774, 775 (Me. 1992)).

Given the facts surrounding the other defamation claims mirror those in Key Bank's complaint, the Court now grants summary judgement on those claims as well.

B. *Punitive Damages*

In Maine punitive damages are only available on tortious conduct upon a clear and convincing showing of malice. *Tuttle* v. *Raymond*, 494 A.2d 1353, 1361-63 (Me. 1985); *see also* Donald N. Zillman, Jack H. Simmons, David D. Gregory, *Maine Tort Law* § 19.07 (1994). In *Tuttle* v. *Raymond* the Supreme Judicial Court of Maine held that:

> [a] standard that allows exemplary [or punitive] awards based upon gross negligence or mere reckless disregard of the circumstances overextends the availability of punitive damages and dulls the potentially keen edge of the doctrine as an effective deterrent of truly reprehensible conduct.

494 A.2d at 1361. While there are no motions on this count, based on the Court's finding with regard to the defamation claims, the Court now finds that summary judgement is also appropriate on all of punitive damages counterclaims as well.

V. Conclusion

Federal law provides a vast array of protections for Native Americans, in an effort to right past transgressions. However these protections are not without parameters. Section 81, for example, covers only contracts with Indians or Indian tribes, for services, relative to Indian lands. The contracts at issue in this case do not fall within these boundaries, and are therefore not governed by this statute.

The Court notes for administrative purposes that the only issues remaining unresolved after the issuance of this order are: (1) Plaintiff's claims against Bernstein for negligence, Count IV, and fraud, Count V; and (2) Defendant John Palmer's counterclaims against PIN for negligent and intentional infliction of emotional distress, and breach of contract (by Palmer and Palmer Management).

For the reasons stated above, it is therefore ORDERED as follows:

(1) Defendants' Motion for Summary Judgement is *GRANTED* on Counts I, II, III, VI, VII, VIII and IX;

(2) Plaintiff Marcello's Motion for Summary Judgement is *GRANTED* on Counterclaims Counts I and II, and the other defamation and punitive damages claims brought by Key Bank, John Schiavi and the Palmer Defendants are also dismissed.

(s) MORTON A. BRODY

MORTON A. BRODY
United States District Judge

Dated at Bangor, Maine this 25th Day of October 1995.

Supreme Court, U.S.
FILED
SEP 4 1997
CLERK

No. 97-219

In The

Supreme Court of the United States

October Term, 1996

PENOBSCOT INDIAN NATION,

Petitioner,

v.

KEY BANK OF MAINE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

WILLIAM L. PLOUFFE
(Attorney for Consumers Water Company)
DRUMMOND, WOODSUM & MACMAHON
246 Commercial Street
Portland, ME 04101
(207) 772-1941

CATHERINE R. CONNORS
Counsel of Record
(Attorney for Key Bank of Maine)
PIERCE ATWOOD
One Monument Square
Portland, ME 04101
(207) 791-1389

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

19 pp

QUESTION PRESENTED

Does 25 U.S.C. § 81 apply to one of two settlement agreements entered into by the Penobscot Indian Nation, a Maine Indian tribe subject to the Maine Indian Claims Settlement Act?

DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Defendant-Respondent Key Bank of Maine, now known as KeyBank, National Association identifies the following parent companies and nonwholly owned subsidiaries:

Parent – KeyCorp.

Nonwholly owned subsidiaries:

Ascot Leasing Partners, Ltd. (19.8% limited partnership interest)

Baptist Village II, Limited Partnership

Bear Peak Limited Partnership (19.5% limited partnership interest)

Brentford Leasing Partners, Ltd. (19.8% limited partnership interest)

Eurotech Leasing Corp.

Forest View Apartments Associates Limited Partnership

Glasstech Holding Co.

Glasstech, Inc.

Holborn Leasing Partners, Ltd. (19.8% limited partnership interest)

Juniper Hill, Inc. (50.0% interest)
Bear Peak Limited Partnership (1.0% general partnership interest)

Kent Leasing Partners, Ltd. (19.8% limited partnership interest)

DISCLOSURE STATEMENT – Continued

Leasetec Funding Corp. I

Leasetec Funding Corp. II

Leasetec Funding Corp. III

Leasetec Management Co. (inactive)

Mitel Capital Corporation

StorageTek Financial Services Corporation

Sutton Leasing Partners, Ltd. (19.8% limited partnership interest)

Technology Leasing Solutions, Inc.

Unisys Leasing Corporation

Leasetec Corporation International
- BPM (Europe) Limited (80.0% interest)
- DEClease (Hong Kong) Ltd.
- DEClease Singapore Pte. Ltd.
- Leasetec Asia Limited
- Leasetec Belgium N.V.
- Leasetec Canada Ltd.
- Leasetec France SARL
- Leasetec GmbH (inactive)
- Leasetec International AB
- Leasetec Investments Pty. Limited
- Leasetec Leasing En Financiering B.V. (inactive)
- Leasetec Maatwerk in Lease B.V. (inactive)
- Leasetec Mexico S.A. de C.V.
- Leasetec Singapore Pte. Ltd.
- Leasetec UK Limited
- Saxum Aktiebolag
- StorageTek Financial Services Canada Ltd.
- Storagetek Location SARL

DISCLOSURE STATEMENT – Continued

StorageTek Miet-und Leasinggelsellschalt mbH
Leasetec Australia Pty. Limited
Leasetec New Zealand Limited

Pursuant to Supreme Court Rule 29.6, Defendant-Respondent Consumers Water Company identifies the following nonwholly owned subsidiaries:

Consumers Maine Water Company
Consumers New Jersey Water Company
Consumers Pennsylvania Water Company

Pursuant to Supreme Court Rule 29.6, Defendant-Respondent Burlington Homes of New England, Inc. identifies the following parent company:

Consumers Water Company

Pursuant to Supreme Court Rule 29.6, Defendant-Respondent SHC Corporation identifies the following parent company:

Consumers Water Company

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

DISCLOSURE STATEMENT ii

TABLE OF CONTENTS v

TABLE OF AUTHORITIES vi

STATEMENT OF THE CASE 1

ARGUMENT 5

I. The First Circuit's Decision Does Not Conflict With Any Supreme Court Decision 6

II. The Decision Would Be Of Minimal Precedential Value 7

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160 (1980) 6, 7

Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985) 6

Narragansett Indian Tribe v. RIBO, Inc., 686 F.Supp. 48 (D.R.I. 1988), *aff'd on other grounds*, 868 F.2d 5 (1st Cir. 1989) 7

Penobscot Nation v. Stilphen, 461 A.2d 478 (Me. 1983) 8

STATUTES AND RULES

25 U.S.C. § 81 ..... *passim*

25 U.S.C. §§ 1451-1543 ..... 3, 11

25 U.S.C. §§ 1721-1735 ..... 1, 8

25 U.S.C. § 1724(d)(3) 8

25 U.S.C. § 1725(h) 8

30 M.R.S.A. §§ 6201-14 1

31 M.R.S.A. § 511 9

Sup. Ct. R. 10 ..... 5, 10

STATEMENT OF THE CASE

The Statement of the Case of Plaintiff-Petitioner Penobscot Indian Nation ("PIN") is accurate, but omits facts relevant to the question whether grant of certiorari would be appropriate. Respondents Key Bank, National Association ("Key Bank" or "the Bank"), Consumers Water Company ("Consumers"), Burlington Homes of New England, Inc. ("Burlington") and SHC Corporation ("SHC"), therefore, supplement PIN's Statement as follows.

I. The Partnership, Sale and Loan to SHC

PIN is an Indian tribe subject to the Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721-1735 and 30 M.R.S.A. §§ 6201-14. (See PIN's cert. petition at A-27.) On December 31, 1986, PIN formed a limited partnership with Palmer Management Corporation, for the purpose of purchasing SHC, a mobile home sales business. (PIN cert. petition at A-3 to A-4.) Pursuant to the Partnership Agreement, PIN became the sole limited partner and Palmer Management the sole general partner. (*Id.*) PIN chose this partnership structure and a role as passive investor for tax purposes and to limit its liability. (Appendix or "App." at 2243, 2245, 2828.)

Upon submission of the Partnership Agreement to the Bureau of Indian Affairs ("the BIA"), the BIA informed the parties that no BIA approval of the Agreement was needed under 25 U.S.C. § 81, because the Agreement "does not encumber trust land or other trust

assets." (PIN cert. petition at A-20.)[1] This conclusion – that Section 81 applies only to agreements involving trust land – has been voiced elsewhere by the BIA. (*Id.* at A-21, citing *Barona Group of the Capitan Grande Bande of Mission Indians v. American Management & Amusement, Inc.*, 840 F.2d 1394, 1404-05 (9th Cir. 1987).)

Also on December 31, 1986, the Partnership bought SHC's assets and business from Consumers, pursuant to a Purchase and Sales Agreement, for approximately $5 million. (*Id.* at A-3 to A-4.) Key Bank financed the purchase. *(Id.)* PIN posted a $1 million letter of credit to secure the loan. (*Id.*)

On October 5, 1987, PIN entered into a Lease-Option Agreement with the Partnership for a parcel of land located in Holden, Maine ("the Holden Lot"). (*Id.)* The Holden Lot was fee land as opposed to trust or tribal land, *i.e.*, it was bought by PIN in fee simple for investment purposes. It was not property held by the United States in trust and was not subject to any trust responsibility by the federal government. (*Id.* at A-13 to A-14.)

In December 1988, with the Partnership unable to make its loan payments, the loan was restructured. PIN allowed the letter of credit to be called, purchased a $200,000 short term note from another bank for working capital and subordinated that note to amounts due Key

---

[1] Section 81, in pertinent part, requires approval of the Secretary of Interior for all agreements made by any person "with any tribe of Indians, or individual Indians not citizens of the United States" for payment or delivery of any money or other thing of value "in consideration of services for said Indians relative to their lands."

Bank. (App. 2313, 2317, 465, 1437.) Through these means, the Partnership reduced its debt to Key Bank by approximately $1.2 million. The Partnership also pledged the Lease-Option Agreement to Key Bank. (PIN cert. petition at A-5.)

In April 1989, with still no improvement in the Partnership's business, the Bank demanded full payment of its loan to the Partnership. (App. 1834, 2930-31.) In May 1989, the Bank notified PIN that it intended to exercise the purchase option contained in the Lease-Option Agreement, and tendered the purchase price ($100,000). (*See id.* at A-5, App. 886, 888-89.)

Acting on the advice of counsel, PIN decided to liquidate the Partnership. As a part of the liquidation plan, PIN assigned the Partnership's assets to the Bank. (PIN cert. petition at A-5.) The BIA approved the transfer of the Holden Lot pursuant to 25 U.S.C. §§ 1451-1543, which forbids, without written consent, any transfer or disposal of a project being improved with federal grant funds within three years of the use of such funds. (*Id.*)

II. The Settlement Agreements

On September 29, 1989, PIN entered into two comprehensive Settlement Agreements. The agreements "contained identical language that served broadly to release, remise and forever discharge all claims involving the signatories." (*Id.* at A-6.) In one Agreement, no mention was made of the Holden Lot at all; it was a simple exchange of releases. (App. 2345.) The second Settlement Agreement provided that the Bank would jointly, with PIN, seek a purchaser for the Lot at a mutually agreed

upon price. (*Id.* at A-11 to A-12; App. 2341.) The Bank, SHC and PIN were signatories to both Settlement Agreements. Consumers and Burlington were signatories to the second Agreement only. (*Id.*)

III. The Proceedings Below

Despite the entry into these two global Settlement Agreements, almost five years later PIN filed a nine-count complaint against the Bank, Consumers and others, alleging misconduct such as fraud and racketeering. (*Id.* at A-6 to A-7). As damages, PIN sought $1.2 million – the money it lost investing in the Partnership. (*See* PIN's Appeal Brief to the First Circuit at 8, 31, 34-35.) PIN argued that the Settlement Agreements did not preclude it from pursuing these claims, because, it claimed, the Agreements were void under 25 U.S.C. § 81.

The Defendant-Respondents filed motions for summary judgment, arguing that Section 81 did not apply to the Settlement Agreements (or the underlying Partnership, Purchase and Sale and Lease-Option Agreements), because none of these was an agreement with "an Indian tribe" involving payment for "services" relative to "Indian lands." A host of other defenses were raised, including (without limitation) lack of standing, statutes of limitations, res judicata, and failure to demonstrate a dispute of material fact as to each element of its underlying claims.[2]

---

[2] With respect to the last defense, for example, the witnesses PIN designated as its representatives under F.R.Civ.P. 30(b)(6) each admitted that they were unaware of any facts

The District Court agreed with Defendant-Respondents that Section 81 did not apply, and, therefore, the Settlement Agreements remained enforceable, because those Agreements were an exchange of releases, not involving the provision of services related to Indian lands. (PIN cert. petition at A-53 to A-65). The District Court also found the racketeering claim barred by the statute of limitations. (*Id.* at A-64.)

PIN abandoned its RICO claim, but appealed the remainder of the District Court's decision. (*Id.* at A-8.). The First Circuit affirmed. The Court of Appeals agreed with the District Court that the first Settlement Agreement did not implicate Section 81, because it did not involve services. (*Id.* at A-11). As to the second Settlement Agreement, the Court stated that it would "assume for the purposes of its opinion" (*id.* at A-12) that the provision obligating the Bank to seek a purchaser for the Holden Lot entailed a "service" within the meaning of the statute. Nevertheless, the Court found, Section 81 would still not apply, because the Holden Lot was fee, not trust, land.

ARGUMENT

PIN claims that the First Circuit erred in finding that Section 81 does not apply to fee lands owned by an Indian tribe. It argues that certiorari should be granted under Supreme Court Rule 10(c), because, it states, the

---

supporting claims of wrongdoing against the Bank. (App. 3089-90, 1182, 1903, 1489; C. Mitchell deposition at 87-94.)

Court of Appeals' holding "conflicts with relevant decisions of this Court."

I. THE FIRST CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY SUPREME COURT DECISION.

In rendering its opinion, the First Circuit stated:

> Although we have uncovered no precedent that explicitly considers whether or not § 81 applies to land that an Indian tribe purchased in fee simple for investment purposes, in doing so now we give voice to an assumption underlying virtually every decision addressing the applicability of § 81 to service agreements with Indian tribes relevant to their lands.

(*Id.* at A-13). As this statement suggests, along with the fact that the BIA adheres to this conclusion, no Supreme Court precedent conflicts with the decision below.

The "conflicting precedent" cited by PIN in its certiorari petition are: (1) *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985); and (2) *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980). The decision in *Montana*, however, simply provides that Indian statutes should be liberally construed. The First Circuit explicitly cited *Montana* in its opinion, acknowledging that it was construing Section 81 liberally, as required. (PIN cert. petition at A-12.)

In *Central Machinery*, the Court held that state taxation of certain sales transactions was preempted under the Indian "trader" statutes (25 U.S.C. §§ 261-64), because

comprehensive federal regulation in the area had occupied the field. 448 U.S. at 166. It is hard to see the relevance, let alone precedential impact of that ruling here. Not only did the decision not even involve Section 81, it went to issues of preemption. In contrast, here, the First Circuit properly focused on the language, purpose, precedent, legislative history, and agency interpretations surrounding Section 81 itself, to determine the statute's specific import.

Indeed, the *only* actual conflicting precedent on point is a trial court opinion from a district court within the First Circuit. *Narragansett Indian Tribe v. RIBO, Inc.*, 686 F.Supp. 48, 51 (D.R.I. 1988), *aff'd on other grounds*, 868 F.2d 5 (1st Cir. 1989). The First Circuit explicitly rejected the district court's reasoning in *Narragansett*, finding it contrary to common sense, the purpose of Section 81 and the reasoning of other courts. (*See* PIN cert. petition at A-25 to A-26, citing *Wisconsin Winnebago Bus. Comm. v. Koberstein*, 762 F.2d 613, 619 (7th Cir. 1985); *United States ex rel Shakopee v. PanAmerican Management Co.*, 616 F.Supp. 1200, 1217-18 (D. Minn. 1985).

In sum, no Supreme Court or Court of Appeals decision is contrary to the First Circuit's. To the contrary, as explained by the First Circuit in its decision, its ruling is consistent with existing precedent interpreting Section 81.

II. THE DECISION WOULD BE OF MINIMAL PRECEDENTIAL VALUE.

While no reason under Supreme Court Rule 10 exists for accepting certiorari, multiple reasons affirmatively militate against such a review.

First, PIN is a *Maine* Indian tribe, whose land and status is governed by the Maine Indian Claims Settlement Act. 25 U.S.C. §§ 1721-1735. Under that Act, Congress explicitly delineated between property lying within and outside Penobscot Indian Territory. Land within the Territory is tribal land. Land outside that Territory, such as the Holden lot "shall be held in fee . . . and the United States shall have no further trust responsibility with respect thereto." 25 U.S.C. § 1724(d)(3).

The Settlement Act also treats Maine Indian tribes differently from other tribes, by recognizing that they have fewer sovereign powers than do other Indian tribes. *See* 25 U.S.C. § 1725(h); *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me. 1983).

The First Circuit repeatedly cited the Settlement Act as one basis for its ruling in this case. (*See, e.g.*, PIN cert. petition at A-14, A-18, n.14, A-26 to A-28.) Thus, the Court of Appeals' holding is not necessarily applicable to all Indian tribes, but rather only to those tribes subject to the Maine Settlement Act. Thus, the precedential value of the case is limited.

Other characteristics of this case demonstrate unique qualities making the case an inappropriate vehicle for broad, general higher court review. For example, PIN does not dispute the First Circuit's conclusion that Section 81 does not apply to the first Settlement Agreement, which does not even mention the Holden Lot. Hence, all the signatories to that first Settlement Agreement – including Key Bank and SHC – can still rely on that first Agreement. Therefore, even if this Court reversed the Court of Appeals' decision as to the second Settlement

Agreement, at most PIN's claims could only go forward against the few parties who only signed the second Agreement. This not only means that only a few parties to the case below have any incentive for continuing to participate in this litigation, but the two parties who actually received PIN's money – SHC directly and the Bank indirectly – could not be pursued further even if this Court answered the question presented in the manner PIN desires.

Other defenses available to the Defendant-Respondents in this particular case also make it an inappropriate vehicle to examine the "fee v. tribal land" issue. For example, the First Circuit only assumed for the purposes of its opinion that the Bank's agreement jointly to search for a buyer of the Holden Lot constituted "services" under Section 81. The tenuous nature of any such "service" underscores the fact that this case is not one which firmly and squarely focuses on the specific issue raised in the certiorari petition.

Similarly, even if PIN prevailed in having the second Settlement Agreement vitiated, PIN still has no standing to raise its underlying claims against any Defendant, because those claims are owned not by PIN, but by the Partnership. *See* the Maine Uniform Limited Partnership Act, 31 M.R.S.A. § 511 (adopting rules as to derivative suits similar to those applied in the corporate context.) The indirect relationship between PIN and the actual claims it seeks to assert defeats any logical purpose in reviewing the threshold question of Section 81 applicability.

Indeed, the fact that the Partnership, not PIN, borrowed and repaid the money at issue demonstrates that *none* of the elements needed to trigger Section 81 may have been met. Aside from proving payment for "services" "relative to Indian lands," for Section 81 to apply, the agreement must be made with an "Indian tribe." While the District Court and First Circuit held that this third element was met, given that: (1) PIN deliberately chose to use the Partnership vehicle to limit its liability and gain tax advantages; (2) the money was lent to the Partnership, not PIN; and (3) the Partnership bound itself to both Settlement Agreements, if the applicability of Section 81 to the Agreements were reviewed by this Court, the finding of the Court of Appeals on this element of applicability should also be re-visited.

Finally, the equities do not support review here. PIN invested in the Partnership. The Bank lent the Partnership money. PIN wants to obtain a windfall, by making someone (other than the Bank, since the first Settlement Agreement still applies) repay its investment. Not only would this result be unfair to the remaining Defendants (or the Bank if it somehow could be brought back in despite the continuing validity of the first Settlement Agreement), but the remedy sought by PIN appears unavailable under Section 81.

Section 81 voids contracts and allows recovery in *qui tam* actions for any money paid to any person by any Indian or tribe, or anyone else, for or on his or their behalf, on account of such services. (*See* PIN cert. petition at 3.) Even aside from the open question whether the tribe itself can pursue such a *qui tam* action, PIN is not seeking recovery of sums paid for services rendered.

Rather, it wants indemnification for the loss of its investment in the Partnership. Section 81 was not designed to provide such relief, and, for this additional reason, this action is far afield from one in which the "fee v. tribal lands" issue is squarely raised, and forms the linchpin of the suit.

Other factors show that the equities favor the Defendant-Respondents. They were explicitly informed in writing by the BIA early on in their relationship with PIN that BIA approval was only needed under Section 81 when trust land was involved. Later, when settling, the BIA also expressly approved the transfer of the Holden Lot under 25 U.S.C. §§ 1451-1543. The Defendant-Respondents did everything they could to comply with federal Indian law.

CONCLUSION

For the reasons stated above, and on the basis of the further discussion of the facts and case law set forth in the opinions of both courts below, the Petition should be denied.

Respectfully submitted,

WILLIAM L. PLOUFFE
(Attorney for Consumers Water Company)
DRUMMOND, WOODSUM & MACMAHON
246 Commercial Street
Portland, ME 04101
(207) 772-1941

CATHERINE R. CONNORS
Counsel of Record
(Attorney for Key Bank of Maine)
PIERCE ATWOOD
One Monument Square
Portland, ME 04101
(207) 791-1389

Counsel for Respondents
Key Bank, National Association,
Consumers Water Company,
Burlington Homes of New England, Inc. and
SHC Corporation